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THE INHERENT JURISDICTION OF EQUITY TO ADMINISTER DECLARATORY RELIEF

O. B. Triplett, Jr.

THE ARREST: PROBABLE CAUSE AND SEARCH WITHOUT A SEARCH WARRANT

Henry B. Rothblatt

March 1964

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THE INHERENT JURISDICTION OF EQUITY TO ADMINISTER DECLARATORY RELIEF

*O. B. Triplett, Jr.**

I. Introduction

The statement that "a declaratory judgment was unknown to the common law" is a cliche commonly employed by courts as an excuse to cover with a semblance of respectability an otherwise ignominious retreat from the proper exercise of their judicial function and prerogative. It will be the purpose of this article to review the function of the judicial determinations and the jurisdiction historically exercised by equity courts in granting declaratory relief, and the "full" jurisdiction "in matters of equity" possessed by courts of chancery in Mississippi.

II. The Judicial Function

The reluctance of jurists to administer preventive relief has been caused to a large extent by the notion that "courts of law will not move unless some duty or obligation is broken."[1] According to this concept justice is only administered against wrong doers in act or intent. To invoke the judicial arm of the state, a delict or wrong must first occur. But an expanding society appreciates the need for legal relations to be stabilized by the adjudication of disputes before they have ripened into physical injury, violence, and loss. And critical students of code and equity procedure, writing at the time of the adoption of our Mississippi Constitution, recognized that the judicial process should afford protection against the denial of established rights and against unfounded claims creating uncertainty and insecurity, and that these were legal "wrongs."[2]

*Attorney at Law, Forest, Mississippi.

[1]Markby, Elements of Law § 852 (6th ed. 1905). Other definitions may be found in Clark, *The Code Cause of Action*, 33 Yale L.J. 817 (1924) and McCaskill, *Actions and Causes of Action*, 34 Yale L.J. 614 (1925).

[2]Bliss, Code Pleading § 113 (3d ed. 1894); Markby, Elements of Law § 862 (6th ed. 1905); Phillips, Code Pleading § 31 (1896); 3 Pomeroy, Equity Jurisprudence § 1378 (2d ed. 1892).

The court's function, thus, is to protect not only the actual physical invasion of the plaintiff's rights—the conception usually associated with delict or wrong—but also the denial or dispute of his right under such circumstances that the plaintiff may properly invoke the court's protection to re-establish, safeguard, and declare his rights and thus restore the social order.[3] This concept of the judicial function was recognized by Mr. Justice Field in 1887: "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[4]

Courts of equity, which were created to escape inflexibility, perform their primary function of creating security not by coercive decrees, but in removing uncertainty by establishing and declaring existing rights without necessarily attributing a wrong to anyone. Since the establishment or declaration of a disputed or endangered right is the only remedy the plaintiff's desires, the court may grant it without necessarily attaching to its decree an order commanding the defendant to do anything. It has been said:

> The real dispute is as to the rights of the respective parties, and a declaration on this point having been once procured, it is frequently well known to all concerned in the litigation that everyone will do what is required, either from motives of honesty, or because the means of compulsion are sufficiently proximate and certain to make it useless further to resist. For this reason we constantly find that the result of litigation is a mere declaration.[5]

III. The Extent of the Judicial Function

The erroneous notion that courts act only after a wrong has been positively committed or imminently threatened results in the equally false assumption that the execution or enforcement of a decree is an essential characteristic of judicial power. This assumption probably arose from a belief that the court's function is to coerce or compel the performance of legal obligations, and that, in the absence of coercion or compulsion, a court is powerless to act and has no "jurisdiction."

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[3]Borchard, Declaratory Judgments 5 (2d ed. 1941). See Holland, Elements of Jurisprudence 325 (13th ed. 1924): "The object of a developed system of law is the conservation, whether by means of the tribunals or of permitted self-help, of the rights which it recognizes as existing." See Gavit, *The Code Cause of Action*, 30 Colum. L. Rev. 802, 805 (1930): "The plaintiff comes into Court seeking judicial recognition of a substantive right."

[4]*In re* Pacific Ry. Comm'n, 32 Fed. 241, 255 (N.D. Cal. 1887).

[5]Markby, *op. cit. supra* note 2, § 862.

Actually the primary function of courts is not to compel or coerce, but to decide, determine, adjudicate, and establish legal relations between contesting parties. A judgment or decree is an affirmation by a legally constituted court of the legal consequences attending a proved or admitted state of facts.[6] Says Black: "We may therefore define a judgment as the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."[7]

Judicial "power" is the power to hear, consider, and determine controversies between rival litigants as to their personal or property rights, and must be invoked at the instigation of one of the litigants.[8] As Mr. Black observes, "an action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action, *declares the existence of the right,* recognizes the commission of the injury, or negatives the allegation of one or the other."[9] (Emphasis added.) And Mr. Black adds that while certain consequences do flow from it—such as the right to issue execution—these are *no part of the judgment,* since the judgment is only a *bare assertion* and has nothing to do with the means of enforcing the liability which it declares.[10] The first and most obvious consequence of a judgment is that it *establishes an indisputable obligation* and confers upon the successful party the right to issue execution. But this, it must be repeated, is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it.[11]

While the United States Supreme Court for a long time seemed to regard the issuance of consequential relief as essential to the power of a court to enter judgment,[12] it is now made very clear that "while ordinarily a case or judicial controversy results in a judgment awarding process of execution to carry it into effect, such relief is not an

---

[6]1 BLACK, A TREATISE ON THE LAW OF JUDGMENTS 1 (1891) [hereinafter cited as BLACK].

[7]*Id.* at 2; DANIELL, CHANCERY PRACTICE 986 (1894), defines a decree in equity as "a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit according to equity and good conscience."

[8]State v. Mohler, 98 Kan. 465, 471, 158 Pac. 408, 410 (1916).

[9]BLACK 2.

[10]BLACK 4.

[11]BLACK 8.

[12]Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 73 (1927). See also Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289 (1928); Gordon v. United States, 117 U.S. 697 (1864).

indispensable adjunct to the exercise of the judicial function."[13] Further, it has been said:

> It is out of the common feature of judgments that the notion developed that, unless the coercive arm or compulsion of the court were invoked, there was no case to the exercise of judicial power, but *it is, in reality, the adjudication and not the command that constitutes the essence of judicial power.* And, in civilized communities, it is the adjudication, and not the command, which evokes respect and official sanction, because it is a determination by the societal agent appointed to perform that function, and thus irrevocably fix legal relations.[14] (Emphasis added.)

The foregoing discussion points out the erroneous assumption that "consequential relief"—by execution or enforcement—is a characteristic of judicial power. Professor Sunderland notes how this erroneous notion was at one time a basis of jurisdiction but disappeared as civilized man advanced.

> In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential.
>
> If this is true, it must be because there is something in civilization itself which diminishes the necessity for a resort to actual force in sustaining the judgments of courts. And it is quite clear

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[13]Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927). Subsequently, in reaffirming *Swope*, the Court, in Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 725 (1929), speaking through Chief Justice Taft said:

> In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. . . . The case of Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it.

[14]BORCHARD, DECLARATORY JUDGMENTS 12 (2d ed. 1941). See SALMOND, JURISPRUDENCE 66 (6th ed. 1920): "[I]t is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement." *Accord,* Braman v. Babcock, 98 Conn. 549, 120 Atl. 150, 152 (1923): "To hold that the judicial power of this state is confined to the consideration of cases where consequential relief only is sought would be enforcing a limitation upon the judicial power, in accord with custom rather than with reason and logic." See Petition of Kariher, 284 Pa. 455, 469, 131 Atl. 265, 270 (1925): "When adverse litigants are present in Court and there is a real controversy between them, a final decision rendered in any form of proceeding of which the Court has jurisdiction is a judgment in the proper sense of that term, *and the giving of it is a judicial function, whether or not execution may follow thereon.*" (Emphasis added.)

that civilization does supply an element which is theoretically capable of entirely supplanting the exercise of force in the assertion of jurisdiction. This is respect for law. If the parties to the action desire to obey the law a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants. The judgment of the court merely directs the will of the parties, and the performance of duty becomes the automatic consequence of the declaration of right.

It is not to be assumed that the peaceful acquiescense of the highly civilized man in the legal findings of the court implies any loss of power in the court itself. Quite the contrary. The greater the ease with which the court's findings impose themselves on litigants, the more the real power of the court is demonstrated. But the force behind the finding of the court has become a latent instead of an active force. This transition is possible, however, only when the existence of the force is so well recognized and so clearly understood that no one would think it worth while to put it to the test. The entire cessation of actual coercive measures on the part of the court would therefore mark, not the disappearance, but the perfection of the rule of force.[15]

IV. Inherent Jurisdiction

Mr. Justice Griffith has traced the development of courts of equity in England and America.[16] It was because the judges in circuit refused cognizance of many classes of cases which were not fitted into the ancient writs that courts of equity were developed to furnish a remedy which would be adequate to meet the needs of an expanding and a civilized society.[17] After the advent of the equitable system of jurisprudence into the field of the common law, the more elastic writ of prevention by bill *quia timet* was introduced; and, thereunder, courts of equity have possessed inherent power to grant declaratory

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[15]Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 Mich. L. Rev. 69, 70-71 (1917).

[16]Griffith, Chancery Practice § 1-12 (2d ed. 1950).

[17]Broom, Legal Maxims *182:

> [T]he Statute of Westminster 2 (13 Edw. 1, c. 24), which . . . was passed to quicken the diligence of the clerks in the Chancery, who were too much attached to ancient precedents, enacts, that "whensoever from thenceforth a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring like remedy, *no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one;* and if they cannot agree, it shall be adjourned till the next Parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors." (Emphasis added.)

relief with broader scope and wider application than that contemplated by the enactment of declaratory judgment statutes.[18]

The English courts have wavered in their pronouncements as to the inherent power of equity courts to grant declaratory relief.[19] But in the United States, while some courts have tenaciously clung to abandoned concepts of the judicial function and others have retreated through fear of an excessive work load,[20] still other American courts have recognized the inherent power of equity to grant declaratory relief.[21]

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[18]ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 1 (1940). See BORCHARD, *op. cit. supra* note 14, at 137.

> The assumption, occasionally indulged, that the rending of declaratory judgments is an innovation in law of procedure seems quite unfounded. For centuries the courts of practically all countries have been rendering judgments determining the pre-existing rights of the litigants, final judgments which are incapable of execution and the execution of which is undesired and unnecessary. These judgments find their greatest utility in the determination of conflicting claims with respect to (a) status, (b) the ownership of, or other rights in, property or (c) other legal relations, and (d) the construction of written instruments. With or without express statutory authorization, the necessities of organized communal life have compelled the recognition of the efficacy of the declaratory judgment as a means of terminating legal controversies. All that is new about the declaratory judgment is its name and its broad scope.

[19]Guaranty Trust Co. v. Hannay Co., [1915] 2 K.B. 536, 568 by Bankes, L. J.: "I cannot doubt that had the Court of Chancery of those days thought it expedient to make declaratory judgments, they would have claimed and exercised the right to do so."

The more modern rule was enunciated in 1882 (before the Mississippi Constitution of 1890 was adopted) by Jessel, M. R. in Curtis v. Sheffield, 21 Ch. D. 1, 3-4 (C.A. 1882):

> Now it is true that it is not the practice of this court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, *unless a present right depends on the decisions,* or there are some other special circumstances to satisfy the court that it is desirable at once to decide on the future rights. *But where all the parties who in any event will be entitled to the property are of age and ready to argue the case, the reason of the rule departs, and it becomes a bare technicality.* (Emphasis added.)

[20]*E.g.,* Anway v. Grand Rapids Ry., 211 Mich. 592, 179 N.W. 350, 351-52 (1920): "Before this Court, with its membership of eight, takes up the work of advising 3,000,000 people, and before the legislature is called upon to increase the membership of this Court, so as to efficiently conduct this work, it is well that this Court pause. . . ."

[21](U.S.) Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123 (1927).
(Cal.) Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 132 (1907):

> But the refinements of civilized life, and the necessity for orderly regulation, determination, and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have already arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times, the power of the courts may be, and often

Even those courts which assert that the jurisdiction of equity to render a declaration of rights is dependent on statutory authority and that this form of redress was unknown to the common law have, nevertheless, exercised this identical power without question with respect to a wide variety of subjects. The United States Supreme Court, in pointing out that it is not an indispensable adjunct to the exercise of the judicial function that a judgment be entered on which execution might issue, has said:

> Naturalization proceedings . . . ; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will . . . ; bills of interpleader, so far as the stakeholder is concerned . . . ; bills to quiet title when the plaintiff rests his claim on adverse possession . . . ; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. . . . *Nor is it essential that only established and generally recognized forms of remedy should be invoked.*[22] (Emphasis added.)

Thus it is held that controversies between insurance companies and their policy holders may be determined in a purely declaratory judgment action under the inherent jurisdiction of equity.[23]

Since the declaratory judgment statutes have been repeatedly held to be procedural and not jurisdictional, it inescapably follows that jurisdiction was inherent in the courts prior to the enactment of declaratory judgment statutes. This conclusion is enforced by the language

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is, exerted to protect property and rights from possible, though at times unknown, claims and pretensions, *or merely to declare a status* or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings. (Emphasis added.)

(Mass.) National Shawmut Bank v. Morey, 320 Mass. 492, 70 N.E.2d 316, 319 (1946): "There is no lack of equity jurisdiction to grant purely declaratory relief, and . . . the refusal of courts to grant it is due to established views of expediency and not to lack of power.

(N.Y.) Stannard v. Atlantic Terra Cotta Co., 138 App. Div. 867, 123 N.Y. Supp., 733 (1910).

See Automotive Equip., Inc. v. Trico Products Corp., 11 F. Supp. 292, 294 (W.D. N.Y. 1935): "Courts of equity have long been decreeing declaratory judgments. It finds its sources of origin centuries ago in the countries of the Old World."

[22]Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927).

[23]Meyer v. Knickerbocker Life Ins. Co., 73 N.Y. 516, 29 Am. Rep. 200 (1878). For other instances in which courts have granted declaratory relief independent of statute see ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS, *op. cit. supra* note 18, § 2.

of the Court of Appeals for the Seventh Circuit in *Davis v. American Foundry Equipment Company*:[24]

> The [declaratory judgment statute] law created no new substantive rights or legal relationships but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties. *Though such relief was inherent in some situations previously, the statute extended* the propriety of *the procedure* greatly, with the obvious intent to avoid delay and accrual of damages against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued.[25] (Emphasis added.)

Since only "procedure" is extended by declaratory judgment statutes it follows that equity courts, without aid of legislative enactment, have inherent power to adjust their procedure to preserve human and property rights; and as Mr. Broom observed more than one hundred years ago:

> It is however important to observe this distinction, that where cases are new in principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the sole question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.[26]

The foregoing instances of particular application of the remedy of declaratory judgment, independent of statute, illustrate that courts of equity have recognized their inherent jurisdiction to administer declaratory relief on the broad principle that the rights of parties ought to be settled. There is no good reason why the same principle should not be extended as instances arise to promote individual security in a highly developing society.[27]

It is apparent that courts which have restricted their functions have thereby refused to extend their usefulness in accordance with the

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[24]94 F.2d 441 (7th Cir. 1938). Relief by declaratory judgment "is only a kind of expanded bill *quia timet*, meant to do in general what the suit did in its limited field." (Meeker v. Baxter, 83 F.2d 183, 187 (2d Cir. 1936).

[25]94 F.2d at 442-43.

[26]BROOM, LEGAL MAXIMS *182-83.

[27]"The problem which confronts the judge is in reality a two-fold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (1921).

increasing demands and needs of modern commercial life, and that a wide field exists for the extension of the present practice to matters in which the court could reasonably exercise a judicial function and render a binding declaratory judgment.

V. Chancery Jurisdiction in Mississippi

Section 159, Mississippi Constitution of 1890 provides that "The Chancery Court shall have full jurisdiction in . . . all matters of equity." This constitutional provision has been in each constitution of the state since 1817.

The Mississippi Supreme Court extended the meaning of this provision in the broadest terms:

> We are instructed to give a meaning to every word in a constitution or statute for each (we must suppose) was used to and in giving complete expression to the will of the lawmaker. The word "full"—"full jurisdiction"—implies that nothing is reserved. *Whatever is a matter of equity, as to that the power to adjudge is full.*
>
> This court was established to preside over and administer that system of equity jurisprudence which then existed—unwritten and positive—*and such enlarged dimensions as it might attain to by an ample development of its principles and a more enlarged application of them to the new circumstances of an advancing society and civilization.* Equity jurisprudence is especially the product of English tried reason and conscience, perhaps their highest and most beneficent achievement.
>
> From small germs it has been of rapid growth, especially in the last century. *However the system may expand, the "full jurisdiction" conferred gives the court capacity to "fully administer it."*[28] (Emphasis added.)

The court mentioned in *Marsh v. Williams*[29] that Mississippi had "adopted the New York practice." This was done by Rule 40 of the court.[30] The equity practice in New York has been to extend declaratory relief in cases of actual controversy even though no consequential relief was sought or was available. Thus in *Meyer v. Knickerbocker Life Ins. Co.*, the earlier New York cases are listed and the following statement given of New York's concept of the judicial function:

> This is a suit in equity to have the court declare existing and in force a contract of insurance upon the life of the plaintiff's husband, which the defendant claims is lapsed by non-payment of the yearly premium. Such a suit can be maintained when the premiums have been tendered and refused on the ground that the contract has been forfeited, when all the parties are before the court in an actual controversy sincerely promoted

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[28]Bank of Miss. v. Duncan, 52 Miss. 740, 745 (1876).

[29]2 Miss. (1 How.) 132, 136 (1834).

[30]4 Miss. 5 (1839); Freeman, Chancery Practice 28 (1844).

> and carried on, when it is necessary for intelligent action for the parties to know at once what are their reciprocal rights and obligations.[31]

Many years ago the Supreme Court of Mississippi observed that "bills to remove a cloud from a title may fall under the head of relief *quia timet*,"[32] and stated that "the principle upon which these bills are based is simply that it is inequitable that a party should be embarrassed by having hanging over him a hostile claim, which, although not actively asserted, and not of any validity, is nevertheless calculated to affect the marketability of the title."[33]

When consideration is given to the inherent jurisdiction of equity courts to grant declaratory relief, the decision of the Mississippi Supreme Court in *Cliburn v. Cliburn*[34] becomes extremely puzzling. In that case the complainant charged that a divorce decree obtained by the defendant in Arkansas had been procured by fraud and invoked the aid of the chancery court to declare the Arkansas decree to be void and the complainant and defendant to be husband and wife. This was a prayer for the declaration of marital status, which has been repeatedly declared by the courts independent of statute.[35] The comment of the court that to declare and adjudicate the parties to be husband and wife would be advisory is unsound and is not supported by the cases cited as authority, since:

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[31]73 N.Y. 516, 29 Am. Rep. 200 (1878).

[32]Phelps v. Harris, 51 Miss. 789 (1875). The bill *quia timet* was a writ of prevention designed to avoid possible future injury to the applicant's property. Lord Redesdale says: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered by a bill which has sometimes been called a bill *quia timet*." REDESDALE, PLEADING 204 (4th ed. 1844). See 2 STORY, EQUITY JURISPRUDENCE § 1141 (14th ed. 1918):

> Lord Coke has explained this matter very clearly in his Commentary on Littleton. "And note," says he, "that there be six writs in law that may be maintained, *quia timet*, before any molestation, distress or impleading. As, (1) a man may have a Writ of Mesne before he be distrained; (2) a Warrentia Chartae, before he be impleaded; (3) a Monstraverunt, before any distress or vexation; (4) an Audita Querela, before any execution sued; (5) a Curia Clandenda, before any default of enclosure; (6) a Ne Injuste Vexes, before any distraint or molestation. And these be called brevia anticipantia, writs of prevention."
>
> Sec. 1142. In their Nature Are Preventive Writs:—Now bills in equity *quia timet* answer precisely to this latter description. They are in the nature of Writs of Prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done.

[33]Phelps v. Harris, 51 Miss. 789, 793 (1875).

[34]209 Miss. 631, 48 So. 2d 126 (1950).

[35]*E.g.*, Groesbeck v. Groesbeck, 78 Tex. 664, 14 S.W. 792 (1890). For a full discussion see BORCHARD, DECLARATORY JUDGMENTS 138 (2d ed. 1941). Also, Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 105, 123-26 (1918).

(1) Both parties were before the court;
(2) A real controversy existed between them—the issue being whether they were married or divorced; and
(3) The foreign divorce decree created insecurity and uncertainty as to their marital status.

Marital status is no different or less important than title to real or personal property.

The court stated that it had "no power to set aside the decree of the Chancery Court of Arkansas," and cited *Miller v. Miller*[36] as authority; but in the *Miller* case, the Mississippi court, noting that the divorce law of Arkansas ignores the question of domicile or residence *animo manendi,* expressly stated that "when such judgments or decrees, which purport to affect or determine the marital status and rights of citizens of this state are contrary to the public policy of this state *our courts will determine* . . . the . . . validity thereof."[37] (Emphasis added.)

It is quite probable that the court felt that in remanding the case the complainant could, by amendment, obtain a decision on the validity of the Arkansas decree; and that no injustice would be done to the parties by the renewal and remand. The concern here is whether the court, in *Cliburn,* has indicated its refusal to enlarge the application of declaratory relief as new causes come before it, contrary to the able opinion of Judge Simrall in *Bank of Mississippi v. Duncan,*[38] or whether, feeling powerless to "set aside a decree of the Chancery Court of Arkansas," it felt that it could only disregard it in awarding specific relief. What if the decree assailed for fraud had been a Mississippi decree and the only prayer had been to hold it invalid and declare the parties to be husband and wife? At least the court's statement that "we think the contention is well taken *under the proceedings herein*" leaves room for hope that the highest court of Mississippi will not abandon its inherent jurisdiction to administer declaratory relief.

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[36]173 Miss. 44, 159 So. 112 (1935).

[37]*Id.* at 58, 159 So. at 117.

[38]52 Miss. 740, 745 (1876).

THE ARREST: PROBABLE CAUSE AND SEARCH WITHOUT A SEARCH WARRANT

*Henry B. Rothblatt**

I. Introduction

In 1961, as a result of the decision in *Mapp v. Ohio*,[1] a great change took place in the practice of criminal law in the United States. The fourth amendment injunction against the use of illegally seized evidence in the federal courts was made applicable to the states. However, the Supreme Court did not at that time indicate what standards should be followed by the states in determining whether the evidence was obtained by an illegal search and seizure. It was not until two years later, in *Ker v. California*,[2] that the Supreme Court announced that the standards followed by the federal government are to be applied by the states in determining the reasonableness of a search and seizure.

It has always been the rule that a search may only be had pursuant to the issuance of a valid search warrant. Search incident to a lawful arrest is one of the narrow exceptions to the constitutional requirement that searches must rest on a search warrant.

In *Jones v. United States*,[3] the Supreme Court noted: "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them."[4]

In his very able dissent in *United States v. Rabinowitz*,[5] Justice Frankfurter wrote:

> When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate, could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.[6]

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[1]367 U.S. 643 (1961).

[2]374 U.S. 23 (1963); see Woody, *Illegal Searches and Seizures—The Conflict Between Federal and Texas Courts*, 6 So. Tex. L.J. 91 (1962).

[3]357 U.S. 493 (1958).

[4]*Id.* at 499.

[5]339 U.S. 56 (1950). See also United States v. Jeffers, 342 U.S. 48, (1951); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

The lawfulness of the arrest will depend, in most cases on whether the arrest is based upon probable cause. Since, therefore, searches incident to a lawful arrest may be made without a warrant it becomes important to examine at the outset the question of probable cause in its relation to the arrest.

II. Probable Cause

The fourth amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The United States Supreme Court has often referred to the history behind the present constitutional requirement of probable cause.

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of probable cause before a magistrate was required.[7]

> The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods. The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.[8]

It will be seen that "probable cause" is constitutionally required in at least three instances:

(1) For an arrest and incidental search without a warrant;
(2) For the issuance of an arrest warrant; and
(3) For the issuance of a search warrant.

The major definitions of probable cause are usually formulated in terms of whether an officer may arrest a person without a warrant. It has been said that probable cause exists where:

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[6]United States v. Rabinowitz, 339 U.S. 56, 70 (1950).
[7]Henry v. United States, 361 U.S. 98, 100 (1959).
[8]Frank v. Maryland, 359 U.S. 360, 363 (1959).

> "[T]he facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[9]
>
> [P]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.[10]
>
> A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.[11]

The same test, namely whether the facts warrant a prudent man's believing that an offense has been committed, is applied, of course, in determining whether or not probable cause exists for the issuance of an arrest warrant.[12]

The obvious difference in the case of arrest warrants as distinguished from arrests without a warrant is that the question of probable cause is determined "by a neutral and detached magistrate," and not by an officer "engaged in the often competitive enterprise of ferreting out crime."[13] For this reason, the United States Supreme Court has indicated that an officer should seek an arrest warrant if time permits rather than arrest without a warrant.[14]

Where the issuance of a search warrant is concerned, it is clear that a showing of such facts by the officer seeking the warrant which might convince a prudent man that an offense has been committed is not enough. The officer must also show probable cause for the court to believe that the article being sought is in the place specified by him in his affidavit for the search warrant. Such probable cause to search is established where there is "substantial basis" for the magistrate to conclude, based upon the facts presented to him by the officer, that the article being sought is "probably present" in the place specified by the officer.[15]

The Supreme Court has said that, while evidence which would establish the defendant's guilt in a criminal trial is not necessary in order to establish probable cause to arrest or search yet, "common rumor or

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[9]Brinegar v. United States, 338 U.S. 160, 175 (1949).

[10]Henry v. United States, 361 U.S. 98, 102 (1959).

[11]Stacey v. Emery, 97 U.S. 642, 645 (1878).

[12]Giordenello v. United States, 357 U.S. 480 (1958); see Rodgers, *Search and Seizure in Mississippi*, 28 MISS. L.J. 20 (1956).

[13]Johnson v. United States, 333 U.S. 10, 14 (1948).

[14]Jones v. United States, 357 U.S. 493, 499-500 (1958).

[15]Jones v. United States, 362 U.S. 257, 271 (1960). See also Nathanson v. United States, 290 U.S. 41 (1933); People v. Fiorito, 19 Ill. 2d 246, 166 N.E.2d 606, 613 (1960).

report, suspicion, or even strong reason to suspect" will not suffice.[16] Probable cause therefore lies somewhere between "strong reason to suspect" and proof of guilt beyond a reasonable doubt. In an attempt to go beyond such a difficult test to apply, the Court has said:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.[17]

Since no two factual patterns are exactly the same, numerous repetitions of cases where probable cause was found to be lacking would be of little value. However, two Supreme Court cases will serve as good illustrative material. They are leading cases on the question of probable cause. The facts of the first, *Henry v. United States*,[18] are best stated in the words of the Court:

> There was a theft from an interstate shipment of whisky at a terminal in Chicago. The next day two FBI agents were in the neighborhood investigating it. They saw petitioner and one Pierotti, walk across a street from a tavern and get into an automobile. The agents had been given, by the employer of Pierotti, information of an undisclosed nature "concerning the implication of the defendant Pierotti with interstate shipments." But, so far as the record shows, he never went so far as to tell the agents he suspected Pierotti of any such thefts. The agents followed the car and saw it enter an alley and stop. Petitioner got out of the car, entered a gangway leading to residential premises and returned in a few minutes with some cartons. He placed them in the car and he and Pierotti drove off. The agents were unable to follow the car. But later they found it parked at the same place near the tavern. Shortly they saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it, waved it to a stop. As he got out of the car, petitioner was heard to say, "Hold it; it is the G's." This was followed by, "Tell him he (you) just picked me up." The agents searched the car, placed the cartons (which bore the name "Admiral" and were addressed to an out-of-state company) in their car, took the merchandise and petitioner and Pierotti to their office and held them for about two hours

[16]Henry v. United States, 361 U.S. 98, 101 (1959); Brinegar v. United States, 338 U.S. 160, 175 (1949); Loche v. United States, 2 U.S. (7 Cranch) 560, 563-64 (1813).

[17]Brinegar v. United States, 338 U.S. 160, 175 (1949).

[18]361 U.S. 98 (1959).

> when the agents learned that the cartons contained stolen radios. They then placed the men under formal arrest.[19]

The issue was whether or not at the time the car was stopped, which the Court viewed as the time the arrest took place, the officers "had reasonable cause to believe that a crime had been committed." The Court answered in the negative, noting the important principle that the fact that contraband was discovered after the arrest cannot relate back to the time of arrest to furnish probable cause. "An arrest is not justified by what the subsequent search discloses."[20]

The second case, *Johnson v. United States*,[21] was referred to in the *Henry* case as the "high water" of the principle of probable cause. In the *Johnson* case, detectives received information from a known narcotic user that unknown persons were smoking opium in a certain hotel. Narcotics agents went to the hotel and "recognized a strong odor of burning opium which to them was distinctive and unmistakable." The odor led to room one, the occupants of which were unknown to the officers. The officers knocked, identified themselves, and after "a slight delay, some shuffling or noise in the room," the door was opened by the defendant. The officers entered the room, arrested the defendant who was alone in her room, and discovered opium in a subsequent search.[22]

The arrest and search were held to be illegal. The Court held that probable cause for the arrest did not exist until the officers had already entered the room and learned that the defendant was alone in the apartment. Until that point, the officers had no way of knowing how many persons were in the room.

> Thus, the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.
> Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do.[23]

Hearsay by itself is insufficient ground for probable cause. The hearsay must be corroborated by other facts within the personal knowledge of the officer.

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[19] *Id.* at 99-100.
[20] *Id.* at 103.
[21] 333 U.S. 10 (1948).
[22] *Id.* at 12.
[23] *Id.* at 16-17.

In *Wong Sun v. United States*,[24] federal agents arrested one Hom Way for possession of narcotics. Hom Way, who had never before given information to the police, informed the officers that he had bought the heroin "from one known to him only as 'Blackie Toy,' proprietor of a laundry on Leavenworth Street." The officers went to a laundry at 1733 Leavenworth Street, one "Oye's Laundry," and a James Wah Toy, who operated the laundry, was subsequently arrested on the premises. Statements he made led to the discovery of narcotics.

In holding that no probable cause existed for the arrest of Toy, the Supreme Court wrote:

> The narcotics agents had no basis in experience for confidence in the reliability of Hom Way's information; he had never before given information. . . . The agents had [no] information giving them reason to equate "Blackie" Toy and James Wah Toy—*e.g.*, that they had the criminal record of a Toy, or that they had consulted some other kind of official record or list, or had some information of some kind which had narrowed the scope of their search to this particular Toy.[25]

In *Willson v. Superior Court*,[26] Mr. Justice Traynor, writing for the Supreme Court of California, said:

> Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency . . . an arrest may not be based solely on such information . . . and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. . . . In some cases the identity of, or past experience with, the informer may provide such evidence, . . . and in others it may be supplied by similar information from other sources or by personal observation of the police.[27]

To the same effect, is *People v. Parren*.[28]

There must be, in the words of the Supreme Court, a "basis for accepting the hearsay."[29] This may be the reliability of the informant (whether he has previously given accurate information); whether the informant's information is borne out by later investigation by the officer; whether the person arrested had a prior criminal record as to the type of crime disclosed by the informer; and the like.[30]

While it is now fairly well settled that hearsay may be considered

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[24]371 U.S. 471 (1963).
[25]*Id.* at 480-81.
[26]46 Cal. 2d 291, 294 P.2d 36 (1956).
[27]294 P.2d at 38.
[28]24 Ill. 2d 572, 182 N.E.2d 662 (1962).
[29]Jones v. United States, 362 U.S. 257, 271 (1960).
[30]*Id.* at 267-71.

in determining whether probable cause to arrest or search existed,[31] it is equally well settled that hearsay by itself will not suffice; it must be corroborated by other facts within the personal knowledge of the arresting or searching officer. It seems clear, however, that past reliability of the informer, while an important factor, will not be enough, by itself, to furnish probable cause for an arrest or search.[32]

The affidavit for a search or arrest warrant must state facts constituting probable cause. Oral testimony, in addition to the allegations of the affidavit or complaint, cannot remedy defects in the affidavit or complaint.[33] If an arrest or search warrant may be issued on the basis of a bare allegation that a defendant has violated the law, unsupported by facts tending to prove the charge, there is no good reason to require warrants at all. The whole purpose of the fourth amendment is to protect citizens from the police through the "informed and deliberate determinations" of a "neutral and detached magistrate."

The fourth amendment requires a showing of probable cause before a search warrant can be justified.

> The language of the Fourth Amendment, that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized," of course applies to arrest as well as search warrants.[34]

The showing of probable cause must be made to the magistrate who issues the search or arrest warrant. Thus, in *Giordenello v. United States*, the complaint for a warrant of arrest read:

> The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation, in violation of Section 174, Title 21, United States Code.[35]

In quashing the warrant of arrest based upon this complaint, the Supreme Court stated:

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[31]Jones v. United States, 357 U.S. 493 (1958); Draper v. United States, 358 U.S. 307 (1959); People v. Jones, 16 Ill. 2d 569, 158 N.E.2d 773 (1959); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478 (1961).

[32]Jones v. United States, 357 U.S. 493 (1958); Wong Sun v. United States, 371 U.S. 471 (1963); Draper v. United States, 358 U.S. 307 (1959).

[33]Giordenello v. United States, 357 U.S. 480 (1958); Paldo v. United States, 55 F.2d 866 (9th Cir. 1932); United States v. Casino, 286 Fed. 976 (1923); United States v. Freeman, 165 F. Supp. 121 (S.D. Ind. 1958); People v. Carminati, 236 N.Y.S.2d 921 (1962).

[34]Giordenello v. United States, 357 U.S. 480, 485-86 (1958).

[35]*Id.* at 481.

> The purpose of the complaint, then, is to enable the appropriate magistrate . . . to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.[36]

In *Nathanson v. United States*,[37] the search warrant read, in part:

> Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: certain liquors of foreign origin . . . and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. . . . ; Now, therefore, you are are commanded, . . . to enter and search the premises. . . .[38]

In holding the search under such a warrant unlawful, the Court held:

> [A] warrant to search a private dwelling may [not] rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.[39]

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[40]

In considering search warrants, the attorney must remember that while an officer may make an arrest without resorting to an arrest warrant, so long as he has probable cause for the arrest, the same right does not exist with regard to searches. That is, probable cause for making a search will not justify the officer in making the search without a warrant. He must still apply for a search warrant from a "neutral and detached magistrate."

III. The Arrest

An arrest has been defined as the "taking, seizing or detaining of the person of another either by touching, or putting hands on him, or by any act which indicates an intention to take him into custody and

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[36] *Id.* at 486.

[37] 290 U.S. 41 (1933).

[38] *Id.* at 44-45.

[39] *Id.* at 47.

[40] Johnson v. United States, 333 U.S. 10, 14 (1948). See also Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 357 U.S. 493 (1958); Agnello v. United States, 269 U.S. 20, 33 (1925).

subject the person arrested to the actual control and will of the person making the arrest."[41] But the arrest may be supported by probable cause and yet be invalid for other reasons, as where an officer enters premises to make an arrest without first giving notice to the occupant of his authority and purpose in demanding entry.[42]

In *Henry v. United States*,[43] federal officers followed a car and waved it to a stop. The car was not forced to the side of the road, but simply waved to a halt. The Supreme Court, accepting the Government's concession on the point, held:

> [T]he arrest took place when the federal agents stopped the car. When the officers interrupted the two men and restricted their liberty of movement, "the arrest," for purposes of this case, was complete.[44]

In *People v. Mirbelle*,[45] the court wrote:

> In the instant case the People contend that defendant was not arrested until after officers viewed the concealed weapon on his person. On the other hand defendant strenuously contends that he was arrested when the officers, with drawn weapons, "hollered" to him to "stick them up, we are police officers, stick them up," and he complied with that order.[46]
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> [Arrest] is derived from the French, arreter, to stop or stay, and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the will of the law. It is called the beginning of imprisonment.[47]
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> "An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge or civil demand. . . . The custody or control, the assumption of which is involved in an arrest, imports actual restraint or detention, the mere utterance of words indicative of an arrest being insufficient, except perhaps when followed by submission. . . . An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary, where the subject of the arrest submits thereto or is otherwise actually subjected to restraint. But, where the per-

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[41]State *ex rel.* Sadler v. District Court, 70 Mont. 378, 225 Pac. 1000 (1924); see RINGEL, ARRESTS, WARRANTS, SEARCHES AND SEIZURES 11 (1963).

[42]Miller v. United States, 357 U.S. 301 (1958); Ker v. California, 374 U.S. 23 (1963).

[43]361 U.S. 98 (1959).

[44]*Id.* at 103.

[45]276 Ill. App. 533 (1934).

[46]*Id.* at 540.

[47]Legrand v. Bedinger, 20 Ky. (4 T.B. Mon.) 539, 540 (1827).

son resists arrest, some manual touching of the body has been held necessary to consummate the arrest. . . .

"An arrest is the taking of a person into the custody of the law. It has also been judicially defined as the taking, seizing, or detaining the person of another; touching or putting hands upon him, in the execution of process, or any act indicating an intention to arrest. . . . An arrest, in the strict legal sense of the term; involves three elements: authority, intention, and a restraint of the person. . . . There must be an intention, understood by the one arrested, to accomplish the arrest. . . . A restriction of the right of locomotion is the most characteristic element of the arrest. . . . An arrest is effected when the party is brought within the power of the officer, an actual manual touching not being essential."[48]

The law governing the validity of a state arrest without a warrant is the statutory law of that state. Where an arrest by a federal officer is concerned, the federal statute[49] will determine the validity of the arrest. In federal arrest situations for which there is no applicable federal arrest statute, "the law of the state where the arrest without warrant takes place governs its validity."[50]

The majority of state jurisdictions and the federal jurisdiction provide by statute for arrests without a warrant for felonies if the arresting officer has reasonable grounds to believe that the person arrested has committed or is in the process of committing the felony. Where arrests for crimes less than felony are concerned, the statutes require that the crime be committed in the presence of the officer before he may make an arrest without a warrant.

The federal arrest statute provides:

> [A]gents of the Federal Bureau of Investigation . . . may . . . make arrests without warrant for any offense . . . committed in their presence, or for any felony . . . if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.[51]

The New York Code of Criminal Procedure provides that a peace officer may, without a warrant, arrest a person:

> When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it.[52]

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[48]People v. Mirbelle, 276 Ill. App. 533, 540-41 (1934).

[49]Federal Bureau of Investigation Acts, 64 Stat. 1239 (1951), 18 U.S.C.A. § 3052 (Supp. 1963).

[50]United States v. Di Re, 332 U.S. 581, 589 (1948).

[51]64 Stat. 1239 (1951), 18 U.S.C.A. § 3052 (Supp. 1963).

[52]N.Y. Code Crim. Proc. § 177(4).

Subdivision (1) of the New York statute, as amended in 1963, allows the police wider latitude in making arrests without a warrant for misdemeanors than is allowed under the federal statute. The officer may arrest without a warrant for a misdemeanor "committed or attempted in his presence" or, in addition, where he "has reasonable grounds for believing that a crime is being committed in his presence."[53] Thus, under the New York statute, the misdemeanor must still be committed in the officer's presence but he need not have positive proof of its commission. That was the requirement under the former New York provision.[54]

The Illinois statutory provision goes one step further than New York, by placing felonies and misdemeanors under the same statutory test. It provides:

> An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.[55]

IV. The Search Incident to Arrest

Not all arrests, however, will justify an incidental search. No matter how valid an arrest may be in a technical sense, if the court finds that it was used by the officers simply as a pretext to make a search of the person, the search is unreasonable.[56] In *People v. Watkins*,[57] the defendant was arrested for a parking violation. A search of his automobile revealed "policy slips." The Supreme Court of Illinois said:

> A search incident to an arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of a crime. But the violation involved in this case was parking too close to a crosswalk. . . . Such on offense does not, in itself, raise the kind of inferences which justify searches in other cases.[58]

In *Henderson v. United States*,[59] the court said:

> And when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at the

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[53]N.Y. Code Crim. Proc. § 177(1).

[54]People v. Moore, 11 N.Y.2d 271, 183 N.E.2d 225 (1962).

[55]Ill. Ann. Stat. ch. 38, § 657 (Smith-Hurd 1935).

[56]Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

[57]19 Ill. 2d 11, 166 N.E.2d 433 (1960).

[58]*Id.* at 437.

[59]12 F.2d 528, 531 (4th Cir. 1926).

> most an incident of the search, ought such search be upheld as a reasonable one within the meaning of the Constitution? Manifestly not.
>
> An arrest may not be used as a pretext to search for evidence.[60]

And in *Worthington v. United States*,[61] the court said: "All the circumstances disclose that the arrest was made as a pretext to search for evidence, and on that ground alone, the evidence should have been suppressed."

California allows a search to precede an arrest where the search is of the person. The state permits the search where it precedes the arrest by only a matter of moments, and the search is based upon probable cause to arrest.

Since it is the arrest that confers the power upon the officer to make an incidental search of the premises as well as the person, the search must follow the arrest. Police officers, even though they have probable cause to believe that certain articles subject to seizure are within a building, may not enter the premises without a search warrant. They may not search for and seize the article and then arrest the defendant. The search cannot precede the arrest.[62]

In *United States v. Royster*[63] the court rejected the so-called California rule and reasoned as follows:

> The necessity which justifies a search incident to an arrest [*i.e.*, the need to protect the arresting officer, to deprive the prisoner of potential means of escape and to prevent the destruction of evidence by the person arrested] does not and cannot arise until an actual arrest is made. It is apparent, therefore, that a lawful arrest is an indispensable prerequisite to a valid search incident thereto.

The Supreme Court said in *Agnello v. United States*:[64]

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.[65]

However, the search of the place must be "reasonable." What is reasonable, the Supreme Court has said, will depend upon the facts and

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[60]United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

[61]166 F.2d 557, 566 (6th Cir. 1948).

[62]Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 357 U.S. 493 (1958); Mosco v. United States, 301 F.2d 180 (9th Cir. 1962); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952).

[63]204 F. Supp. 760, 763 (N.D. Ohio 1961).

[64]269 U.S. 20 (1925).

[65]*Id.* at 30.

circumstances of each case.[66] The general rule, however, is that a search will only be reasonable where the officers are searching for some specific item or group of items.[67] General and exploratory searches, without any specific objective in mind, but "in the hope that evidence of crime might be found," are universally condemned as unreasonable and violative of the fourth amendment, even though incident to a valid arrest.[68]

The Supreme Court has repeatedly limited the articles which may be seized as an incident to an arrest to:

(1) Articles which may be or may furnish the means to effect an escape;
(2) Contraband;
(3) The fruits of the crime; and
(4) Instruments or implements of the crime.[69]

"Mere evidence" may not be seized either as an incident to a lawful arrest or even under a lawful search warrant. The reason advanced is that the seizure of "evidence" of a crime would be in effect compulsory self-incrimination.[70]

V. The Automobile

An automobile is a protected area within the fourth amendment. It is clearly established that an automobile is no more vulnerable to an incidental search without a warrant, than a private residence.[71] However, the fact that a motor vehicle may, in general, be quickly removed from a jurisdiction has led the courts to allow officers to search motor vehicles without warrants when it would have otherwise been impracticable to obtain warrants. The United States Supreme Court, in *Carroll v. United States*,[72] said:

> [T]he guaranty of freedom from unreasonable searches and seizures . . . has been construed, . . . as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of an . . . automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[73]

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[66]United States v. Rabinowitz, 339 U.S. 56 (1950).

[67]*Ibid.*

[68]United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[69]*E.g.*, Harris v. United States, 331 U.S. 145, 154 (1947).

[70]*E.g.*, Abel v. United States, 362 U.S. 217, 234-38 (1960).

[71]Henry v. United States, 361 U.S. 98 (1959); Rios v. United States, 364 U.S. 253 (1960) (taxicab); People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456, 460 (1960).

[72]267 U.S. 132 (1925).

[73]*Id.* at 153.

However, the rule of the *Carroll* case does not authorize warrantless searches of automobiles in the absence of "probable cause." As the Supreme Court has said:

> [The holding in *Carroll v. United States*] does not mean, as seems to be assumed, that every traveler among the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[74]

Furthermore, the test for determining whether there is probable cause to support a warrantless search of an automobile is just as strict as that for probable cause for the issuance of a search warrant or for arrest without a warrant.[75]

Since the rule which permits an officer to search an automobile without a warrant is based on the ground that "it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," it is clear that only *mobile* vehicles may be searched without a warrant. In any case where the vehicle is not mobile, as where the defendant has already been taken into custody prior to the search and the car is parked in the street or in a garage, the police may not search the car without a search warrant. As one court said:

> We are not here confronted with an arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. The automobile here searched without a search warrant was not in movement and was not occupied by defendant at the time of the search or at the time of his arrest . . . . Under these circumstances the search of his automobile was unreasonable.[76]

Most traffic violations are of such a nature that there are no fruits of the crime and no instrumentalities of the crime other than the motor vehicle itself. Therefore, a search incidental to an arrest for a traffic violation can not, in general, be justified as a search for fruits

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[74]Brinegar v. United States, 338 U.S. 160, 177 (1949).

[75]See Henry v. United States, 361 U.S. 98 (1959); People v. Adorno, 234 N.Y.S.2d 674, 678 (1962).

[76]United States v. Stoffey, 279 F.2d 924, 928-29 (7th Cir. 1960). See also Husty v. United States, 282 U.S. 694 (1931); Rent v. United States, 209 F.2d 893 (5th Cir. 1954).

or instrumentalities of the crime. In *People v. Blodgett*,[77] a taxicab was double parked. Its passengers were people who had been under police surveillance for narcotic violations. The cab was searched and marijuana found. No citation was issued for the traffic violation. The court said:

> Although the cab driver could have been arrested for double parking, the search of his cab cannot be justified on that ground, for it had no relation to the traffic violation and would not have been incidental to an arrest therefor.[78]

In *People v. Zeigler*,[79] the defendant was stopped for passing a stop sign. The defendant and his car were searched. Wagering memoranda were discovered. The search was held illegal, the court saying that a lawful traffic arrest did not by itself justify an incidental search. Again, in *People v. Gonzales*,[80] an automobile was stopped with only one headlight burning. The occupants of the car were requested to leave it, so that an officer "could check it." In checking the car, the butt of a pistol was seen sticking out of the front seat. The defendant was then charged with carrying a concealed weapon. The search was held to be invalid. And in *People v. Molarius*,[81] the defendant was arrested for making a U-turn. Officers then searched the car and found narcotics. A narcotics conviction was reversed because there was no relation between the search and the traffic violation.

Arrests for the following violations have been held not to justify incidental searches of the person or the vehicle:

(1) Passing on a curve;[82]
(2) Having only one headlight burning;[83]
(3) Illegally parking;[84] and
(4) Failing to stop for a stop sign.[85]

In *Brinegar v. State*,[86] the Oklahoma Court summarized the requirements for conducting a search incident to an arrest for a minor traffic violation:

> Offiers are not justified after a valid arrest of motorist for minor traffic violation, in searching his person or his immediate presence, such as the seats and glove compartment of his car,

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[77]46 Cal. 2d 114, 293 P.2d 57 (1956).
[78]*Id.* at 58.
[79]358 Mich. 355, 100 N.W.2d 456 (1960).
[80]356 Mich. 247, 97 N.W.2d 16 (1959).
[81]146 Cal. App. 2d 129, 303 P.2d 350 (1956).
[82]Burley v. State, 59 So. 2d 744 (Fla. 1952).
[83]People v. Gonzales, 356 Mich. 247, 97 N.W.2d 16 (1959).
[84]People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960).
[85]People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960).
[86]97 Okla. Crim. 299, 262 P.2d 464 (1953).

excepting in cases where the officers have reasonable grounds for such action, the seats and glove compartment of the car may be searched for firearms, and this only as a precaution for the safety of the arresting officer and to prevent escape, when done in good faith.[87]

On rehearing, the court said:

We would make clear that not every arrest of a motorist for a traffic violation would justify a search of the seats and glove compartment for weapons. There must be facts and circumstances observed by the officers to cause them in good faith to believe that the motorist is armed, is dangerous, or apparently intends to escape. Each case necessarily must stand or fall on its particular facts and circumstances.[88]

VI. Conclusion

Many lower court judges are reluctant to recognize those constitutional rights of a defendant that are subject to protection under the fourth amendment. In fact, great antipathy is directed to a defendant who asserts his fourth amendment rights. These judges should remember the warning of Mr. Justice Jackson in *Brinegar v. United States*,[89] where he wrote:

Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers themselves are the chief invaders, there is no enforcement outside of court. Only occasional and more flagrant abuses come to the attention of the courts, and then only those where search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted.

[A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose interest and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.[90]

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[87] *Id.* at 466.

[88] *Id.* at 480-81.

[89] 338 U.S. 160 (1949).

[90] *Id.* at 180-182.

Prior to the decision in *Mapp v. Ohio*,[91] in states which did not recognize the exclusionary rule, police officers readily discovered defendants with narcotic contraband in their pockets. Officers charged with the enforcement of the gambling statutes, would always find gambling paraphernalia in the defendant's pockets or places of business, which possession defendants always freely admitted.

Since *Mapp*, an amazing change has taken place. Suddenly police officers discover that there are no contraband narcotics on the person of the defendant or in his home. Gambling paraphernalia and betting slips are no longer found on the defendant's person, pocket, or home. Instead defendants have developed a strong propensity for throwing the contraband to the ground in the presence of an officer at the immediate sign of his approach. This is done to enable the officer easily and vividly to observe the contraband falling from the defendant's hands to the ground. Thus, the defendant obligingly removes himself from the protection of the fourth amendment. Since he is deemed to have abandoned the contraband, the officers find no necessity in making a search. Consequently none of the rights of the defendant under the fourth amendment are violated.

Any alert and enlightened jurist must be aware of this questionable situation. Mr. Justice Geyls, writing for the Supreme Court of Puerto Rico, suppressed the evidence based upon the stereotyped false testimony of a police officer, and stated that "as judges we must not after all be so innocent as to believe testimony which none else believes."[92] The logical consequence of such thinking would be to reject testimony and suppress evidence wherever there is improbability in the officer's testimony.

Appellate courts should not hesitate to over-rule the specious reasoning and "expedient" decisions arrived at by lower court judges who obviously accept and give encouragement to perjured testimony by police officers. We must not lose sight of the fact, however, that judges inclined to uphold law and order are reluctant to allow the guilty to go free upon a question of illegally seized evidence. But the purpose of the exclusionary rule is to deter invasion of the right of privacy by the police officer. That right is fundamental to our Constitution. The citizen must be protected against improper law enforcement as well as against law breakers.

Mr. Justice Brandeis, dissenting in *Olmstead v. United States*,[93]

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[91]367 U.S. 643 (1961).

[92]People v. Arroyo, 83 D.P.R. 582 (1961). See Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56 (1961).

[93]277 U.S. 438 (1928).

sums up the proper solution to the dilemma posed by the application of the fourth amendment. He stated:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.[94]

In the "preservation of the purity of its temple,"[95] the court must protect itself and the government from "prostitution of the criminal law."

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[94] *Id.* at 485.

[95] Sorrells v. United States, 287 U.S. 435 (1932).

State Bar Section

CURRENT TRENDS IN NEGLIGENCE LAW*

I. Introduction

Rather than attempt a detailed analysis of one or two recent trends in negligence law, it is felt that it would be desirable to describe the overall effect of some of the developing trends. One or two general comments may be offered in the beginning. The growth of the Common Law has taken place perhaps more spectacularly in tort law than in other fields. Tort law involves a form of social engineering—the identification and weighing of varying social and individual interests and demands. As the importance of these interests change so the law may change.[1] In negligence law the prime objective is to achieve justice between the individuals. Certainty is not as important here as it is in other fields. The parties were not planning their conduct on existing rules of law when the injury occurred. The law comes into play after the injury takes place in an attempt to achieve justice between the parties. For this reason change is more easily possible here than in such fields as commercial and property law where advance planning must rely upon established rules. This circumstance has had its effect upon the judicial process in tort law.

The law of negligence itself is almost a current trend. We are sometimes surprised to look back on the development of negligence law and to find that it started less than 150 years ago. During this period the trends have been many but there has been one dominating trend—toward wider and more extensive coverage. Dean Prosser characterizes this as "the rapid and often spectacular movement of the law of torts in the direction of increased liability to the plaintiff."[2] This is shown in many different ways which can be demonstrated in some detail.

Why this dominating trend? The reasons are not entirely clear but we can speculate and find a number of reasons. The first is perhaps a general trend on the part of both law and government away from rugged individualism and toward a more paternalistic attitude. There is now a much greater readiness to look after an individual rather than to leave him to his own devices. The second reason is that the concept of fault is no longer meaningful as it once was; we are no longer as insistent that the defendant must have been found morally deficient in order to be held liable. A third is that the courts are not now as ready to grant a virtual

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[1]See Prosser, Torts § 3 (2d ed. 1955) [hereinafter cited as Prosser].

[2]Prosser and Smith, Cases and Materials on Torts ix (3d ed. 1962).

subsidy to developing industry in the form of a partial immunity to tort liability. Instead, we have as a fourth reason the current idea that an enterprise or activity should bear the burden of its own risk and not cast it on an innocent party who has been injured. Coupled with this is the idea that the enterprise may be able to spread the risk among its customers or the public as a whole, whereas the injured plaintiff has no means of spreading it. A fifth reason lies in the presence of liability insurance so that a judgment against a defendant will not prove as harmful or as damaging to him as it otherwise would. A sixth reason may be in the idea underlying workmen's compensation statutes and other similar schemes. Cumulatively, these reasons have proved quite weighty and the trend has become so pronounced that it is easily perceptible.

How has the general trend taken place? Here there are actual decisions which can be relied upon and we are no longer speculating.

1. *Leaving Matters to the Jury.* The courts today seem far less inclined to grant a directed verdict for the defendant than they were in earlier years. This is much more explicit in the federal cases involving the FELA,[3] but it is generally observable in most of the state courts too.[4] There is less control by the court and this has the indirect result of producing more decisions for the plaintiff. In a sense this is strange when it is compared with the trend in England and Canada toward doing away with the jury in negligence actions.

2. *Standard of Care.* At an earlier time there appeared to be a tendency toward laying down specific rules of conduct as contrasted with the general standard of what a reasonable prudent man would do under the same or similar circumstances. This was pushed by Mr. Justice Holmes, particularly in connection with the so-called stop-look-and-listen rule.[5] Today the trend is in the other direction. The courts have eliminated most of the specific judge-made rules and let the case go to the jury under the general standard of care.[6] Even when there is a criminal statute involved, while most of the courts follow the negligence *per se* rule, they have now come to realize that there may be excused violations of the statute.[7] There is coming to be a recognition that the judge is not bound by the criminal statute since it was

[3]See Alderman, *What the Supreme Court Has Done to the Old Law of Negligence*, 18 Law & Contemp. Prob. 110 (1953).

[4]See James, *Practical Changes in the Field of Negligence*, 38 MICH. S.B.J. 10 (1958).

[5]Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

[6]Pokora v. Wabash Ry., 292 U.S. 98 (1934); Halfacre v. Hart, 192 Tenn. 342, 241 S.W.2d 421 (1951); PROSSER § 40; 2 HARPER & JAMES, TORTS § 17.2 (1956) [hereinafter cited as HARPER & JAMES].

[7]RESTATEMENT (SECOND), TORTS § 288A (Tent. Draft No. 4 1959).

not enacted for a civil situation but that he must decide himself whether to adopt it and to use it.[8]

3. *Proof of Negligence.* Proof of breach of the standard of care is normally by direct evidence as to what happened. At an early time circumstantial evidence was permitted and this was known as the doctrine of res ipsa loquitur. Many courts referred to it as a distinct doctrine with rigid requirements which should be met. Today there is more definite recognition that it is merely a form of circumstantial evidence and the courts do not pay as much attention to whether the three or four specific requirements have been met. Instead, they are concerned primarily with whether the circumstantial evidence is strong enough to allow a reasonable jury reasonably to reach a verdict for the plaintiff.[9]

4. *Scope of Duty.* Here there have been numerous developments. Perhaps the single most striking one is the general holding now that a person may recover for prenatal injuries.[10] There is now general recognition that emotional suffering may be a link in a chain toward producing physical injury so that recovery will be allowed.[11] Inroads have been made on the old rules that one is not liable for nonfeasance.[12] The courts have been ready to find a relationship between the plaintiff and defendant which might give rise to a duty to act. If a defendant's activity caused an injury or created a risk to the plaintiff, he then may be under a duty to act affirmatively to help. The hit-and-run statutes are an illustration of this and have provided a means of developing the law in this regard.[13] The restricted duties of manufacturers and landowners have been broadened and will be discussed in more detail later.

5. *Proximate Cause.* There is now, in most states, a greater readiness to leave to the jury the question of what results are foreseeable.[14] The risk idea is coming more freely into use and I think it will eventually be recognized that a standard should be used here as well as in the determination of whether there was a breach of duty—a standard expressed by a test such as that there must be a reasonably close con-

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[8]RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft No. 4, 1959).

[9]See generally HARPER & JAMES § 19.5-19.12; PROSSER § 42-43.

[10]Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Shousha v. Matthews Drivurself Service, Inc., 358 S.W.2d 471, 210 Tenn. 384 (1962). Note, 3 VAND. L. REV. 282 (1950); Note, 8 VAND. L. REV. 521 (1956).

[11]The leading jurisdiction holding to the restricted rule has just changed. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961). See HARPER & JAMES § 18.4; PROSSER § 37.

[12]See generally HARPER & JAMES § 18.6; PROSSER § 38.

[13]Brooks v. E. J. Willig Truck Transp. Co., 40 Cal. 2d 669, 255 P.2d 802 (1953); Brumfield v. Wofford, 143 W. Va. 332, 102 S.E.2d 103 (1958).

[14]See generally HARPER & JAMES § 20.1-20.6; PROSSER § 47-50.

nection between the risk and the injury.[15] The use of the term, risk, lays less emphasis upon the need that the results be foreseeable but even when the courts have talked about foreseeability they have recently been more ready to find it present. There is a strong tendency toward the elimination of privity of contract as a requirement. Even in the case of the "unforeseeable plaintiff" there are cases indicating a broadened scope of liability.[16] Here again, however, the British courts may be running contrary to the trend.[17]

6. *Damages.* The trend here is toward "the more adequate award." Inflationary prices were slow in reaching the law of damages but in some states they have followed the inflation with a vengeance.[18] Forms of demonstrative evidence such as the use of the blackboard and day-by-day or minute-by-minute calculations of pain and suffering have augmented amounts of damages.[19] Here, too, there is a wider tendency toward leaving the decision to the jury with less inclination now than in the past to insist on remittiturs.

7. *Contributory Negligence.* Here the trend toward leaving the determination of negligence to the jury has produced a form of indirect comparative negligence.[20] Several states have passed comparative negligence statutes, and there are many others which have statutes abolishing the defense of contributory negligence in certain types of situations such as at railroad crossings or in master-servant relationships where the master has elected not to come within the workmen's compensation statute.[21]

8. *Assumption of Risk.* Assumption of risk has decreased as a defense. There is wider realization that the idea might be divided and explained as involving either contributory negligence or a holding that there was no duty owed by the defendant.[22] Breaking it up in this

[15]See Prosser, *Paslgraf Revisited*, 52 MICH. L. REV. 1 (1953); Wade, Book Review, 8 VAND. L. REV. 657, 660-63 (1955).

[16]See Amaya v. Home Ice, Fuel & Supply Co., 23 Cal. Rptr. 131 (Cal. App. 1962); see Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1958).

[17]See Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388, [1961] 1 All. E.R. 404.

[18]See issues of the NACCA Law Journal for listings of large verdicts.

[19]See McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); *but see* Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

[20]See ULMAN, A JUDGE TAKES THE STAND 30-34 (1933).

[21]See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CHI.-KENT L. REV. 189, 304 (1950).

[22]See Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959); Siragusa v. Swedish Hospital, 60 Wash. 2d 310, 373 P.2d 767 (1962); McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

manner to its constituent elements means that it is losing an independent significance.[23]

9. *Immunities.* The traditional immunities are now being greatly reduced. At one time it was widely held that charities were immune to any tort action; but now the majority rule may well be opposed to this.[24] Similarly, there is a decrease in governmental immunity. Insofar as municipalities are concerned, the change is both judicial and statutory.[25] Insofar as states and the federal government are concerned, it is primarily statutory.[26] Intrafamilial immunities are also decreasing.[27] The trend on all of these is so great that it may well be that in a short while immunities of this nature will have disappeared in a majority of states.

10. *Expansion of Strict Liability.* The English doctrine of *Rylands v. Fletcher*[28] initially had a very poor reception on this side of the Atlantic. Recent cases, however, have begun to adopt it, especially with the explanation given in the Restatement that the liability exists for ultrahazardous activities.[29] Emphasis has been given also on Lord Cairn's characterization of "non-natural" uses. Perhaps soon the word most frequently used will be abnormal uses.[30] Strict liability has also been extended through construction of criminal statutes to create negligence *per se.* It has developed in connection with foodstuffs through the warranty technique. The idea of nuisance has also been used to extend it.[31]

11. *Vicarious Liability.* Here, too, there has been a broadening of liability. The family car doctrine has developed and expanded.[32] Statutes have been passed imposing liability on the owner of an automobile who lends it to another person.[33] Agency presumptions have been created by statutes.

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[23]See generally HARPER & JAMES § 21.1-21.8; PROSSER § 55; also see the symposium on assumption of risk in 22 LA. L. REV. 1-166 (1961).

[24]See President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Note, 19 U. PITT. L. REV. 119 (1957).

[25]See Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Gardner, Geller, McGrory, & Shaffer, *An Inquiry into the Principles of Municipal Responsibility in General Assumpsit and Tort,* 8 VAND. L. REV. 753 (1955).

[26]See Anderson, *Claims Against States,* 7 VAND. L. REV. 234 (1954); Gottlieb, *The Tort Claims Act Revisited,* 49 GEO. L.J. 539 (1961).

[27]See McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959); Sanford, *Personal Torts Within the Family,* 9 VAND. L. REV. 823 (1956).

[28]L.R. 3 H.L. 330 (1869).

[29]RESTATEMENT, TORTS §§ 519-20 (1938).

[30]See PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 135 (1953); PROSSER § 56-61.

[31]See Prosser, *Nuisance Without Fault,* 20 TEX. L. REV. 399 (1942).

[32]See Annot., 132 A.L.R. 981 (1941); HARPER & JAMES § 26.15.

[33]HARPER & JAMES § 26.16; PROSSER § 66.

This has been a very rapid attempt to cover the whole of negligence law. I should like now to take a few moments to speak in somewhat more detail about two portions of the field—manufacturer's liability and landowner's liability.

II. Manufacturer's Liability

It is in the area of manufacturer's liability that we have had the most striking dramatic growth of the law. Beginning with the decision of *Winterbottom v. Wright*[34] in 1842, the rule was that there was no duty to use care owed by a manufacturer or supplier of a chattel to a person with whom he was not in privity of contract. Over a period of years this harsh rule was subjected to numerous exceptions—exceptions which were synthesized and put together at various times. Finally in the case of *MacPherson v. Buick Motor Company*,[35] in 1916, Judge Cardozo made another synthesis of the decisions and declared that the exceptions had eroded the rule so that it was to be stated the other way. Rapidly this new position was adopted in other jurisdictions, until the point where it has now been recognized in every state and there are only one or two states in which it has not been specifically adopted. This has been a growth which provided a classic illustration of change in the law. But it has not stopped here. In the meantime in several states the holding that a warranty exists in connection with foodstuffs was expanded by one means or another to apply to third parties. Most of the cases used the idea of a warranty running with the chattel[36] though there were numerous other fictional devices utilized.[37] This began as a minority rule followed by only a few states, but the number has now increased—gradually for a time and then more rapidly—to the point where the American Law Institute has been ready to announce it in the Restatement of Torts (Second) as the general rule. Once again the growth has not stopped. A few states started expanding beyond foodstuffs and applying it to similar matters like animal food or other things involving "intimate bodily use."[38] The cases here have developed so rapidly that between meetings of the American Law Institute a change was necessary and now the holdings are extending to many other things. There are several important cases involving auto-

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[34] 10 M.&W. 109, 152 Eng. Rep. 402 (Ex. 1842).

[35] 217 N.Y. 382, 111 N.E. 1050 (1916).

[36] See Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[37] Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

[38] *E.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (cigarettes); Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959) (fish food); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (home wave solution).

mobiles.[39] Where it will go we do not know at the present time but it is clear that the law is now in a state of rapid flux.[40] Most of the cases have talked in terms of warranty. The new *Restatement* will explain this in terms of strict liability in tort. The provision in Section 402A of *Restatement*, which I quote, will probably be very influential on the development of the law:[41]

> [O]ne engaged in the business of selling food for human consumption or other products for intimate bodily use, who sells such a product in a defective condition unreasonably dangerous to the consumer, is subject to liability for bodily harm thereby caused to one who consumes it, though
>
> (a) the seller has exercised all possible care in the preparation and sale of the product, and
>
> (b) the consumer has not bought the product from or entered into any contractual relation with the seller.

It should be significant that the Institute has expressly set out certain caveats because the members were not certain where the law would go and did not want to straight-jacket it by having black letter law which would control it.

III. Landowner's Liability

All of you are aware of the hierarchy of plaintiffs in this connection. A landowner does not owe, it is generally said, an unequivocable duty to use care. He owes due care to the invitee or business guest, a lesser amount to a licensee, still less to the tolerated intruder, and still less to the trespasser.[42] But the law here has been changing. First, the classification of the plaintiffs has been subject to change. At one time there seemed to be some thought that in order to be classified as an invitee a person had to have a business connection with a landowner. Today the cases are otherwise on this; if the landowner holds the premises open to the public or a large portion thereof, members of the public then are invitees to whom he owes the duty of ordinary care.[43] As for the trespasser, there was quickly developed a different rule regarding child trespassers, in connection with the so-called attractive nuisance

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[39]Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960); *cf.* Continental Copper & Steel Indus. Inc. v. E. D. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. App. 1958).

[40]See generally, Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

[41]RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, 1962).

[42]See generally HARPER & JAMES § 27.1-27.11; PROSSER § 75-80.

[43]See HARPER & JAMES § 27.12; PROSSER § 78; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

doctrine. As for the adult trespasser it came to be held that when his presence was known there was a duty to him to use care in regard to activities conducted on the premises. If many trespassers were to be found in a small area there it may now be held that there is a duty owed to use care to observe them.[44] As for the licensee the early rule was that liability existed only for "wilful and wanton misconduct." Today it is generally held that there is a duty to use care regarding activities conducted on the premises and the expression of the duty regarding the condition of the premises has been somewhat relaxed.[45] Special rules have developed regarding firemen and other persons who come to the land under a legal privilege.[46] Duties are owed by easement holders as distinguished from landowners.[47] There has been comparatively little change regarding the duty owed to social guests but indications are developing that there may be changes in this regard.[48] As a matter of fact, the time is becoming ripe for a "MacPherson decision" in this field of landowner's liability. Some day some court will render a decision which synthesizes the cases and which indicates that the duty owed should be expressed in the same fashion in which it is expressed in other negligence cases—that is to say, the care which would be exercised by a reasonable, prudent man under the same or similar circumstances.[49] Within the circumstances involved are to be considered the classification of the plaintiff and the nature of the premises. A decision of this nature if rendered with a good, strong opinion is likely to snowball and to attract many other similar decisions.

What can we say of the future? It is clear, I think, that the trend will continue, that the scope of liability will be broadened. Already there are many writers who are urging that in the law of traffic and transportation some form of strict liability with an administrative agency similar to that established by the workmen's compensation laws should be adopted. At one time the great majority of the negligence cases dealt with the master-and-servant relationship. The large treatise on master-and-servant law by Labatt[50] is not used at all today. Will statutes be passed in the same fashion to eliminate the common law

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[44]HARPER & JAMES § 27.3-27.7; PROSSER § 76; James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953); Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).

[45]HARPER & JAMES § 27.8-27.10, PROSSER § 77.

[46]HARPER & JAMES § 27.12-27.14; PROSSER § 460-62.

[47]See RESTATEMENT, TORTS § 383-86 (1934).

[48]HARPER & JAMES § 27.11; PROSSER § 447-48.

[49]See McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45 (1936) *cf.* Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955).

[50]LABATT, MASTER AND SERVANT (2d ed. 1913).

dealing with automobile accidents,[51] or will the change in the law through judicial growth be sufficient to take care of the social pressures which are developing in this regard? The answers cannot be predicted at this time, but lie in large measure with the members of the judiciary, for whom this paper was prepared with the hope that this thumbnail sketch will give a clear picture of how far the law has already moved.

[51]See Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1 (1954); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950); James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959).

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Student Comments

IMPLIED COVENANT TO PROTECT LEASED PREMISES FROM DRAINAGE WHERE LESSEE IS RESPONSIBLE FOR DRAINAGE

I. Introduction

The scope of this comment is a discussion of the implied covenant in an oil and gas lease to protect the leased premises from drainage. A general review lacking in extensive case analysis is made of the ordinary rules of liability under this implied covenant where drainage is caused by a third party operator on an adjoining tract. A more complete examination is made of the effect that drainage caused by the lessee (rather than by a third party) has on the ordinary rules governing the implied covenant to protect against drainage. Emphasis is accorded to the leading cases of *Millette v. Phillips Petroleum Co.*[1] and *Phillips Petroleum Co. v. Millette*[2] and the modification thereof by two recent Mississippi decisions.[3]

II. Origin of the Implied Covenant to Protect Against Drainage

Oil and gas in its natural state is generally found beneath the earth's surface in reservoirs that often extend under property owned by different people irrespective of boundary lines. A producing well creates a low pressure area to which oil and gas migrate so that one landowner is able to drain the mineral through his well from beneath the property of another.[4] This migratory capacity of oil and gas led to the adoption of the rule of capture allowing freedom from liability for the drainage[5] and the adjoining landowner whose property is being drained has only the remedy of self-help.[6] Such relief, however, is denied the landowner once he leases the land, as the lessee has exclusive control of the premises.[7] The result has been a uniform declaration by the courts that there is an implied covenant on the part of the lessee

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[1]209 Miss. 687, 48 So. 2d 344 (1950).

[2]221 Miss. 1, 72 So. 2d 176 (1954).

[3]Monsanto Chemical Co. v. Sykes, 245 Miss. 207, 147 So. 2d 290 (1962); Monsanto Chemical Co. v. Andreae, 245 Miss. 11, 147 So. 2d 116 (1962).

[4]See Generally 1 Summers, Oil and Gas § 63 (Perm. Ed. 1959) (hereinafter cited as Summers).

[5]Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. St. 235, 18 A. 724, 725 (1889).

[6]Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 A. 801, 802 (1907).

[7]Merrill, Covenants Implied in Oil and Gas Leases § 94 (1940) (hereinafter cited as Merrill).

to drill wells offsetting producing wells on adjoining lands that are draining oil or gas from the leased property.[8]

III. Implied Covenant to Protect Where Drainage is Caused by a Third Party

Normally drainage from the leased premises is caused by a third party lessee producing through a well on an adjacent leasehold. The burden of proof is upon the lessor to show that the lessee has breached the implied covenant to protect against drainage.[9] The duty of the lessee is not to protect against inconsequential or trivial drainage; it is incumbent upon the lessor to show substantial drainage away from the leased premises.[10] The term substantial drainage is not clear from the cases.[11] One writer explains this lack of clarity in the following manner:

> What these cases reflect . . . is concern over imposing liability on an operator when the evidence tends to be somewhat speculative and indefinite and the loss of oil or gas is relatively slight. The evidence in drainage cases is almost always something less than exact; the quantity of petroleum being drained away often can be established only in terms of maximum and minimum figures. By requiring proof of substantial drainage, the courts can minimize the effect of the inexactitude of the evidence.[12]

A showing of substantial drainage alone is insufficient to impose liability on the lessee. The lessor must prove that an ordinary prudent operator under the circumstances acting for the best interest of both the lessor and the lessee would have drilled an offset well.[13] It is well settled that an ordinary prudent operator will not drill an offset unless it can be reasonably expected to produce in paying quantities.[14] The term paying quantity has been intepreted to mean that the offset well will repay the cost of drilling, equipping, and operation, and yield at least a small profit to the lessee.[15]

There is authority for the proposition that acceptance of delay rentals with knowledge that drainage is taking place waives the right of the lessor to have a protection well drilled.[16] In addition, if the

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[8] *Ibid.*

[9] Kulp, Oil and Gas Rights § 10.72 (1954).

[10] Merrill § 110.

[11] *Ibid.* See cases cited in note 62.

[12] Myers, *Two Drilling Covenants Implied in Oil and Gas Leases*, 38 Minn. L. Rev. 127, 129 (1954).

[13] Summers § 399; see generally Merrill § 277.

[14] Sullivan, Handbook of Oil and Gas Law, § 93 (1956) (hereinafter cited as Sullivan).

[15] *E.g.*, Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928).

[16] Merrill § 103.

lessor is aware that the drainage is taking place, he must give the lessee notice that further delay rentals will not be accepted and demand that a protection well be drilled.[17]

The general rule seems to be that the existence of an express covenant in the oil and gas lease pertaining to the lessee's obligation to drill a protection well precludes the operation of the implied covenant to protect against drainage.[18] A limitation on the distance from the leased premises within which the lessee will be liable for drainage seems to be the essential effect of such clauses. However, in order to state a cause of action under the express covenant the lessor must show the same conditions prerequisite to liability as under the implied covenant.[19]

IV. Implied Covenant to Protect Where Drainage is Caused by the Lessee

It is not uncommon for a single lessee to control several adjoining tracts of property. As a result, in actions founded on failure to prevent drainage it has been necessary for the courts to consider whether the fact that the lessee caused the drainage by operation on a neighboring tract alters the ordinary rules of liability discussed above—*i.e.*, is it significant that the lessee is responsible for the drainage?

The courts seem to have taken at least three different positions on the problem.[20] One group of cases attributes no significance whatever to the fact that the lessee has caused the drainage and the ordinary rules of liability are applied.[21] In one decision in this group recovery was denied because the offset well would not produce in paying

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[17]*Id.* at § 113.

[18]*E.g.*, Lloyd's Estate v. Mullen Tractor & Equip., 192 Miss. 62, 4 So. 2d 282 (1941).

[19]See Sullivan § 394; see generally Merrill, *Lease Clauses Affecting Implied Covenants*, Southwestern Legal Foundation, 2d Inst. on Oil and Gas Law and Taxation 141, 170-81 (1951).

[20]See generally Meyers and Williams, *Implied Covenants in Oil and Gas Leases: Drainage Caused By the Lessee*, 40 Texas L.R. 923 (1962); and Meyers, *Two Drilling Covenants Implied in Oil and Gas Leases*, 38 Minn. L.R. 127 (1954).

[21]Billeaud Planters v. Union Oil Co., 245 F.2d 14 (5th Cir. 1957); Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444 (10th Cir. 1945); Cooper v. Ohio Oil Co., 108 F.2d 535 (10th Cir. 1939); Arkansas Natural Gas Corp. v. Pierson, 84 F.2d 468 (8th Cir. 1936); Hamilton v. Empire Gas & Fuel Co., 297 Fed. 422 (8th Cir. 1924); Clear Creek Oil & Gas Co. v. Brunk, 160 Ark. 574, 255 S.W. 7 (1923); Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 N.E. 381 (1909); Myers v. Shell Petroleum Corp., 153 Kan. 387, 110 P.2d 810 (1941); Leeper Oil Co. v. Rowland, 239 Ky. 295, 39 S.W.2d 486 (1931); Hood v. Southern Prod. Co., 206 La. 642, 19 So. 2d 336 (1944); Deep Rock Oil Corp. v. Bilby, 199 Okla. 430, 186 P.2d 823 (1947); Chapman v. Sohio Petroleum Co., 297 S.W.2d 885 (Tex. Civ. App. 1956); Sinclair Oil & Gas Co. v. Bryan, 291 S.W. 692 (Tex. Civ. App. 1927).

quantities.[22] The action was brought against a lessee for failure to protect from drainage and the defendant had four producing oil wells on adjoining tracts which were draining plaintiff's land. Although the record shows that the lessee owned the adjoining tract, the court does not seem to attach any special importance to this fact.[23] The following statement from this opinion indicates the basis for the holding:

> A lease of this kind contains an implied covenant that the lessee will exercise reasonable diligence in the development of the leasehold and in the protection of it from undue drainage through wells on adjacent lands and reasonable diligence in the development and protection of the premises means the doing of that which an experienced operator of ordinary prudence would do in the premises, having due regard for the interest of both lessor and lessee. . . . But the lessee does not bear an implied obligation to drill an offset well to prevent drainage unless, taking into consideration all existing facts and circumstances, it would probably produce oil in sufficient quantity to repay the whole sum required to be expended, including the cost of drilling, equipping, and operating the well, and also pay a reasonable profit on the entire outlay. No obligation rests upon the lessee to carry the operation beyond the point where they are profitable to him, even if some benefit to the lessor would result from them. . . . The burden rested on plaintiffs to prove the breach of the implied covenants to protect the leasehold from undue drainage. It was incumbent upon them to prove that had an offset well been drilled on the Roosevelt Place addition, it probably would have produced or would produce sufficient oil to repay the expense of drilling, equipping, and operating the well, and also pay a reasonable return on the outlay. . . . In other words, the ultimate fact necessary for them to establish was that it probably would have paid to drill an offset well. . . . As indicated by the findings, the proof was insufficient in that essential respect. Therefore, plaintiffs were not entitled to recovery.[24]

A second group of cases recognize that the lessee is responsible for the drainage, but the specific holding is made that this fact has no effect on the duty of the lessee to prevent drainage.[25] In *Hutchins v. Humble Oil and Refining Co.*[26] the lessee owned the ⅛ royalty as well as the ⅞ working-interest in the adjoining tract. For this reason the plaintiff contended that there was a greater duty on the lessee to protect against drainage.[27] However, the court rejected the argument

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[22]Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444 (10th Cir. 1945).

[23]*Id.* at 445.

[24]*Id.* at 446.

[25]Tidewater Assoc. Oil Co. v. Stott, 139 F.2d 174 (5th Cir), *cert. denied*, 331 U.S. 817 (1946); Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921).

[26]216 Pa. 362, 65 A. 801 (1907).

[27]*Id.* at 572.

for a greater duty and simply applied the ordinary rules of liability.[28] Four years later the Fifth Circuit, relying heavily on the *Hutchins* decision, refused to impose a greater burden on the lessee because his operations were causing the drainage.[29] The court stated that "the implied covenant to protect from drainage does not impose an insurer's liability upon the lessee. . . .[30]

A third group of cases hold it to be significant that the lessee is responsible for the drainage by operations on an adjacent tract—*i.e.*, the liability of the lessee is increased.[31] The decisions have increased the liability of the lessee and decreased the burden of the lessor in several different ways depending upon the peculiar facts of each case and the clauses of the various leases interpreted. In an ordinary action for damages for failure to protect from drainage against a third party, acceptance of delay rentals with notice of drainage is generally considered to be a waiver of the cause of action under the implied covenant.[32] However, where the lessee is responsible for the drainage a number of cases have held that this is no bar to recovery.[33] In addition, several decisions have nullified express clauses of the oil and gas lease designed for the protection of the lessee, when said clauses would bar recovery in an action against a third party lessee for violation of the protection covenant.[34] In *Blair v. Clear Creek Oil and Gas Co.*[35] the defendant lessee was also the lessee of adjoining lands. The lessor had received rentals for delay in development but refused to receive further

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[28]*Id.* at 573.

[29]Tidewater Assoc. Oil Co. v. Stott, 159 F.2d 174 (5th Cir.), *cert. denied*, 331 U.S. 817 (1946).

[30]*Id.* at 177.

[31]Geary v. Adams Oil & Gas Co., 31 F. Supp. 830; Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921); Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937); Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1945); Central Ky. Natural Gas Co. v. Williams, 249 Ky. 242, 60 S.W.2d 580 (1933) (dictum); Hughes v. Busseyville Oil & Gas Co., 180 Ky. 545, 203 S.W. 515 (1918) (dictum); Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176, 74 So. 2d 731 (1954); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950); Dillard v. United Fuel Gas Co., 114 W. Va. 684, 173 S.E. 573 (1934); Trimble v. Hope Natural Gas Co., 113 W. Va. 839, 169 S.E. 549 (1933); Adkins v. Huntington Dev. & Gas Co., 133 W. Va. 490, 168 S.E. 366 (1932).

[32]See MERRILL § 103.

[33]Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950); Trimble v. Hope Natural Gas Co., 113 W. Va. 839, 169 S.E. 529 (1933).

[34]Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921); Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal. 2d 232, 73 P.2d 1163; Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1945).

[35]148 Ark. 301, 230 S.W. 286 (1921).

payments and demanded the drilling of offsets.[36] The court allowed recovery despite the presence of the express delay rental provision.[37] It is common for oil and gas leases to contain express clauses requiring the lessee to offset draining wells within a certain distance from the leased premises. As discussed above, such clauses are usually held to preclude the implied covenant to prevent drainage.[38] But where the lessee is responsible for the drainage, a few cases have imposed liability even though the drainage well is beyond the distance expressed in the lease.[39] In *Hartman Ranch Co. v. Associated Oil Co.*, where there was a common lessee of two properties, the court held that the express clause requiring ten wells did not affect the implied covenant to drill offset wells, limiting it to a situation in which there was a common lessee.[40] Finally, it seems that the most significant manner in which the liability of the lessee has been increased is by the holding of some courts that the lessor may recover damages against a lessee for drainage even though there is not sufficient oil under the lessor's land to justify a prudent operator in drilling a well on lessor's tract.[41]

There is some dispute among legal writers as to whether a greater liability should be placed on the lessee for causing drainage by his own operations. The following passage indicates the impression of one authority:

> Is the duty of protection rendered more onerous by the fact that the lessee owned the draining wells? There are cases which return a negative answer to the question. On the other hand, a recent federal case has relied heavily upon the fact of drainage by the lessee's own wells, stating that this presents a "much stronger" case in favor of finding a breach of the covenant for protection. Other authority may be cited in favor of this position, and there is a suggestion in one of the reviews that the lessee may not set up that protective wells would be unprofitable.
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> What justification there is for the suggested distinction is somewhat puzzling to me. Why it should be any worse for the

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[36] *Ibid.*

[37] But see Clear Creek Oil & Gas Co. v. Bushmaier, 161 Ark. 26, 255 S.W. 37 (1923).

[38] See Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950); 2 SUMMERS, OIL AND GAS 394 (2d ed. 1959).

[39] Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 774 (Dist. Ct. App. 1945); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950).

[40] 10 Cal. 2d 232, 73 P.2d 1163 (1937).

[41] Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940); Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1945); Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 731 (1954); Adkins v. Huntington Dev. & Gas Co., 113 W. Va. 490, 168 S.E. 366 (1932).

> lessee to drain off the oil through his own adjoining wells than to permit others to do so, or what greater damage the lessor sustains by such conduct, I cannot see. The only apparent significance is in connection with what the West Virginia Supreme Court of Appeals calls "fraudulent" drainage.[42]

Another authority seems to take a contrary position by suggesting that a number of the courts are recognizing the existence of two separate covenants with regard to drainage. One is the "protection covenant" against drainage by a third party and the other is the "depletory covenant" which is applied where the lessee is responsible for drainage through wells on adjacent tracts.[43] A compromise view of the two mentioned above would not eliminate the substantive requirement that an offset well be profitable, but would place the burden of going forward with the evidence and the burden of persuasion of profitability on the lessee.[44]

V. Doctrine of the *Millette* Cases

Comprehensive consideration was given to the problems surrounding drainage caused by the lessee drilling on adjoining lands by the Supreme Court of Mississippi in the often discussed *Millette* decisions decided in 1950[45] and 1954.[46] Phillips Petroleum Company held a lease on the Millette property which contained the following provision:

> In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith lessee agrees to drill such offset wells as a prudent operator would drill under the same or similar circumstances.[47]

In addition to the Millette lease the lessee had leased three adjacent tracts on which were drilled three producing oil wells, all at a distance of more than 150 feet from the Millette property. The lessors notified the lessee that drainage was occurring and demanded protection against the depletion. The lessee denied any responsibility for the drainage and refused to surrender the lease; subsequently the lessors accepted delay rentals.

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[42]Merrill § 111; *e.g.*, Adkins v. Huntington Dev. & Gas Co., 113 W. Va. 490, 168 S.E. 366 (1932).

[43]Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A. L. Rev. 508 (1956).

[44]Meyers and Williams, *Implied Covenants in Oil and Gas Leases: Drainage Caused by the Lessee*, 40 Texas L. Rev. 923 (1962).

[45]Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344.

[46]Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176.

[47]Millette v. Phillips Petroleum Co., *supra* note 45 at 699-700, 48 So. 2d at 345-346.

The lessors then filed a bill in chancery court seeking cancellation of the lease and damages for the drainage of oil from beneath their land. The trial court sustained a demurrer to the bill.

On appeal the holding on the demurrer was reversed and the case remanded for trial on the question of damages. The court held that the implied covenant to protect against drainage was precluded by the express provision to offset wells within 150 feet, and thus denied to the lessors any relief on this ground.[48] However, the court proceeded to hold that there exists—separate and apart from the implied duty to drill an offset—a responsibility in the lessee to protect the interest of the lessor against a depletion of the lessor's land by the affirmative acts of the lessee upon adjacent property. For the basis of this additional duty the court seems to rely upon the public policy of the state as expressed in the first section of the conservation statute and quoted by the court as follows:

> "It is hereby declared to be in the public interest . . . to safeguard, and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each such owner may obtain . . . his just and equitable share of production therefrom; and to obtain, as soon as practicable, consistent with the prohibition of waste, the full development by progressive drilling of other wells in all producing pools of oil and gas or all pools which may hereafter be brought into production of such, within the state, until such pool is fully defined. . . ."
>
> Although oil is a fugacious product and ordinarily belongs to the producer who captures it upon his own lands, yet when such producer is under an obligation to do nothing to destroy or deplete the lands of his lessor, he may not with impunity impair the value of his lessor's property. Such an obligation gains equitable recognition when substantial drainage is caused by the lessee himself. This responsibility is separable from a duty to drill offset wells, and an express covenant which absolves the lessee from this method of development does not relieve the lessee of liability for substantial drainage by him.[49]

The court also held that the duty was not barred by the acceptance of annual delay rentals with knowledge of drainage, as "acceptance of such rentals is relevant solely to the duty to drill; they are not compensation for waste or depletion."[50]

Upon remand to the trial court a judgment was rendered in favor of the lessors for drainage from their land in the amount of $12,500.00. The chancellor found that there was not a sufficient quantity of oil beneath the lessor's land to justify the drilling of an offset well. Hence

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[48] *Id.* at 702, 48 So. 2d at 347.

[49] *Id.* at 703-704, 48 So. 2d at 347.

[50] *Id.* at 706, 48 So. 2d at 348-349.

the principal question on appeal in the second *Millette* case was whether a lessor can recover damages against a lessee for drainage from his lands, where the lessee is draining the lessor's land by its own well on an adjacent tract, but there is not sufficient oil under the lessor's land to justify a prudent operator in drilling a well on lessor's tract.

By a five to three decision—later changed to a four to four decision when a majority justice joined in the dissent on suggestion of error[51]—the court held that the prudent operator rule has no place in a case involving drainage by a common lessee where there exists an affirmative duty to refrain from depletion, but instead it applies only to the obligation to drill offset wells. The court had the following to say about its rejection of the prudent operator rule:

> [T]he former opinion did not state and did not hold that to authorize a recovery of compensation for drainage there must be a showing that the amount of oil underlying appellee's land must be of such quantity that a prudent operator would drill a well thereon. On the contrary it pointed out that the duty to drill offset wells, as expressly stipulated and limited in the lease, is separable from the implied covenant to compensate for drainage and that the latter survives unimpaired. Cases were cited in the opinion which hold that the so-called "prudent operator" rule has no application to a state of facts such as here presented, and we shall presently refer to some of them. The "prudent operator" rule has its place in those cases involving the duty to drill an offset well under an implied covenant where not expressly provided for in an oil and gas lease, and it is usually inserted in leases where the duty to drill offset wells is spelled out in the lease, such as the lease in the present case. But notwithstanding the fact that the rule has no place in a suit for recovery of compensation for drainage by a common lessee from one tract of land through a well drilled on an adjoining, the duty to drill offset wells and the duty to compensate for drainage being entirely separate, some courts have extended the rule to apply to suits for drainage. We decline to follow the rule as laid down by such courts. It is contrary to every concept of equity and justice to hold that a lessee may drill on adjoining land and through such a well drain dry the land on which it refuses to drill and thereby deplete the resources of its lessor and enrich itself to that extent without the expenditure of one dime in developing the lessor's land and then refuse to pay the lessor the royalty for his oil which it has taken from him. It is not only contrary to equity and justice, but is contrary to the express royalty provision in the lease here involved that appellant would pay the one-eighth royalty on the oil produced and saved from said land.[52]

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[51]Phillips Petroleum Co. v. Millette, 221 Miss. 39, 74 So. 2d 731 (1954) (suggestion of error).

[52]Phillips Petroleum Co. v. Millette, 221 Miss. 1, 15-16, 72 So. 2d 176, 178 (1954).

Thus, the court concluded that the only requirement for recovery under such facts was that the drainage be substantial.

Joined by two other justices, Justice Ethridge interposed a persuasive dissent stating that the effect of the majority holding would be to impose absolute liability on the lessee of two adjoining tracts for all oil drainage from one tract by its well on the other. The dissent argues that strict liability for all drainage by adjoining wells is contrary to "a principle basic in the entire development of oil and gas law."[53] The opinion contends that the prudent operator test is adequate protection of the lessor's interest, since drainage is not injurious to the lessee unless the offset well would have been profitable. All of the cases relied on by the majority except two, says the dissent, "were concerned with whether the obligation to drill offset wells existed on the assumption that production could be obtained from such offset wells in paying quantities. None of them considered the instant question, where production admittedly could not be obtained in paying quantities."[54]

The two exceptions are a decision by a California Court of Appeals[55] and one by a federal district court from Illinois.[56] The *Bush Oil Co. v. Beverly-Lincoln Land Co.* decision arose in a factual situation similar in essential respects to that of the *Millette* cases. The court denied to the lessee the defense that a prudent operator would not have drilled an offset. Damages for drainage were awarded to the lessor and the court concluded as follows:

> There is an implied obligation on the part of an oil and gas lessee to refrain from taking an affirmative course of action which will result in draining a substantial quantity of the oil and gas from the lessor's property and producing the same through the lessee's well on adjacent premises belonging to a different lessor. For a breach of this obligation the lessee is liable and is accountable for the royalty on the portion of the oil and gas which he drains from beneath the leased premises.[57]

The dissent in *Millette* refers to *Bush* as a decision by an inferior California court which stated a rule broader than was necessary, since production could have been obtained in paying quantities on plaintiff's lease.[58]

Geary v. Adams Oil and Gas Co. also involved a factually similar situation to that of *Millette*. It reached a conclusion that *Bush* and *Mil-*

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[53]*Id.* at 26, 72 So. 2d at 184.

[54]*Id.* at 37, 72 So. 2d at 189.

[55]Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1945).

[56]Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940).

[57]Bush Oil Co. v. Beverly-Lincoln Land Co., *supra* note 55 at 252-253, 158 P.2d at 758.

[58]Phillips Petroleum Co. v. Millette, 221 Miss. 1, 36, 72 So. 2d 176, 188 (1954).

lette squarely adopted but without citing any authority. No doubt both the California and Mississippi courts were strongly influenced by the following portion of the *Geary* opinion:

> Looked at solely from the defendants point of view, the location of a well in the southeastern part of the lease perhaps would not have been a prudent operation in view of defendant's belief that, though it might pay out, the chances of making a profit were very questionable. If the defendant had no interest in the adjoining leases on the north and south, it would seem that its defense, based on the foregoing facts, might be sound.
>
> But here the mind is haunted by the fact that the defendant is the beneficiary of the oil drained from plaintiff's land by the wells on the north and south which belong to the defendant. It has not only been saved the cost of drilling, equipping and operating a protecting well, but it gets the oil anyway without plaintiff's being paid for it.[59]

The *Millette* dissent, relying on a subsequent decision by the Illinois Supreme Court,[60] states that the *Geary* decision appears to be contrary to the Illinois rule.[61]

After thus dispensing with the cases relied on by the majority, the *Millette* dissent concludes that the great weight of authority supports application of the prudent operator rule even though the lessee is causing drainage by adjoining operation.[62] The basic conflict lies in the refusal of the dissent (and the courts which support its position) to recognize an "independent implied covenant not to injure the lessor's lease."[63]

The *Millette* cases were shocking in some quarters provoking considerable discussion as to the full effect of the holdings.[64] Without question these two decisions fit squarely into that category of cases affording significance to drainage by the lessee on an adjoining tract and by that fact increasing his liability. Acceptance of delay rentals with knowledge of drainage and the presence in the lease of an express

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[59]Geary v. Adams Oil & Gas Co., *supra* note 56 at 834.

[60]Carter Oil Co. v. Dees, 340 Ill. App. 499, 92 N.E.2d 519 (1950).

[61]221 Miss. at 36, 72 So. 2d at 188.

[62]*Id.* at 37-39, 72 So. 2d at 189-90.

[63]*Id.* at 34, 72 So. 2d at 187.

[64]For a discussion of the Millette cases see Custy, *Interpretation of Oil and Gas Leases*, 26 MISS. L.J. 28, 35 (1954); Kreig, *Lease Terminations for Breach of the Implied Obligations of the Lessee*, 3d ROCKY MOUNTAIN MINERAL LAW INST. 697, 721 (1957); Malone, *Problems Created by Express Lease Clauses Affecting Implied Covenants*, 2d ROCKY MOUNTAIN MINERAL LAW INST. 133, 152 (1956); Merrill, *Lease Clauses Affecting Implied Covenants*, SOUTHWESTERN LEGAL FOUNDATION 2d *Inst.* ON OIL AND GAS LAW AND TAXATION 141, 174 (1951); Myers and Williams, *Implied Covenants in Oil and Gas Leases: Drainage Caused by the Lessee*, 40 TEXAS L. REV. 923, 928 (1962); Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A. L. REV. 508, 516 (1956).

clause relieving the lessee of liability for drainage within a specified distance apparently will not bar recovery in an action for damages involving drainage by a common lessee. One writer regarded the decisions as holding that the prudent operator rule has no place in a case involving drainage by the lessee on an adjoining tract.[65] Another authority, apparently drawing support from the dissent as to the effect of the majority opinion, contends that the *Millette* cases would impose absolute liability for all drainage, regardless of the profitability of an offset well, where the lessee is responsible for the drainage.[66]

A recent federal district court decision in Wyoming[67] has given added weight to the *Millette* doctrine. Certain property owners brought an action against a gas company, lessee of plaintiff's property, for damages sustained through drainage of natural gas from beneath their land. A gas well was completed on an adjoining tract by lessee from which production was obtained. Afterwards repeated demands were made by plaintiffs upon the lessee to drill their land to prevent drainage. The gas company surrendered the lease several months after production on the adjacent property and after considerable drainage had occurred, in accordance with a lease provision allowing the lessee to surrender the lease at any time without the consent of the lessor. The evidence showed that a prudent operator would not have drilled on the plaintiff's property. Plaintiffs maintained that the prudent operator rule was inapplicable and that the lessee had a duty to refrain from doing anything which would injure their property. The court sustained this contention and allowed the property owners to recover in the following language:

> Under the facts of this case due regard for the interests of the lessee demonstrates that the reasons for the application of the "prudent operator" rule, which excuses a lessee from an implied covenant to drill offset wells when it is not economical to do so, are overcome. There is no question that under ordinary circumstances the "prudent operator" rule is sound and fair, but to apply that rule here permits Sinclair to keep the Olsen lease, thereby preventing exploration and development on the Olsens' land, for many months after production from and drainage through its well on the adjoining land. Ultimately Sinclair could take all of the gas underlying the Olsens' property to the same extent as though a well had been drilled thereon, without incurring any expense, and without any compensation whatever to the Olsens, even though their lease required the payment of a royalty for gas produced from their land. The Court concludes that under facts such as these, there is an implied covenant on the part of the lessee under an oil and gas lease not to drain oil or gas from under his lessor's land.[68]

[65]Malone, *supra* note 64.

[66]Kreig, *supra* note 64.

[67]Olsen v. Sinclair Oil & Gas Co., 212 F. Supp. 332 (D. Wyo. 1963).

[68]*Id.* at 334.

The conclusion reached by the court rendering the prudent operator rule inapplicable and imposing a greater duty upon the lessee appears to be predicated very strongly in the extraordinary circumstances of the case. The peculiar facts of the case to which the court has reference are not clear.

VI. Modification of the *Millette* Doctrine

A re-examination of the *Millette* cases was conducted by the Supreme Court of Mississippi in two recent decisions.[69] In *Andreae v. Monsanto Chemical Co.*[70] the lessee was the owner of several leases in Simpson County, Mississippi, including one on the Andreae lands and two others adjacent thereto variously described by the court as the Monsanto forty and the Grantham forty. In the fall of 1959 a producing well was completed by Monsanto directly north of the Andreae lands on the Monsanto forty. Shortly thereafter the complainant Andreae demanded that Monsanto drill a well on his property. Monsanto notified complainant that it could not justify a well on his land, but that efforts were being made to "farm out" the lease for a well. Subsequently, in 1960 a farm out agreement was made with a third party who agreed to drill a well on the Grantham forty in consideration for six leases including the lease on the Andreae lands. The well was drilled and it resulted in a dry hole. Complainant brought suit against Monsanto for drainage from the Andreae lands by the well on the Ainsworth forty. The evidence showed the amount of oil beneath complainant's property to be about 25,000 barrels of which about seventy-five percent was drained by Monsanto's well. The total value of all the recoverable oil was only $70,000 and the cost of completing a well on the property would have been between $100,000 and $150,000. It was undisputed that a prudent operator would not have drilled a well on the Andreae forty. The chancellor awarded the complainant the value of his interest in the oil drained by Monsanto's well.

The Mississippi Supreme Court reversed the lower court holding the prudent operator rule applicable even though the lessee was responsible for the drainage. Substantial drainage was held to be a prerequisite to the lessee's liability and it was not present. It was urged by the lessor that the *Millette* case rendered the prudent operator rule inapplicable and a showing of substantial drainage unnecessary. To this contention the court made the following reply:

> It is true that in Millette the court said that neither the rule of capture nor the prudent operator rule was applicable to

[69]Monsanto Chemical Co. v. Sykes, 245 Miss. 207, 147 So. 2d 290 (1962); Monsanto Chemical Co. v. Andreae, 245 Miss. 11, 147 So. 2d 116 (1962).

[70]245 Miss. 11, 147 So. 2d 116 (1962).

> that case under the facts there. That was, however, a very different case from the case we have here. As stated by Judge Hall, the appellant's position in that case was entitled to scant consideration in a court of equity because Phillips had refused to drill a well on appellee's land, contending that no oil could be produced from it, and had also refused to cancel the lease so that the lessor might undertake to find some other operator to drill, and after refusing this, had further declined to accept a substantial consideration for cancellation of the lease. Phillips refused to do anything and refused to let anybody else do anything to ascertain whether there was any oil on Millette's land. We do not have such a case here. Also, in the Millette case, the chancellor found that Phillips had drained $100,000 worth of oil from Millette's land, and this court held such was a substantial amount. It also found that a well could have been drilled for $70,000 which would have left Phillips a profit after drilling and after paying Millette his royalty.[71]

Thus, with this language the court reserves the inapplicabiilty of the prudent operator rule to a situation analogous to *Millette* and apparently makes a showing of substantial drainage necessary in any suit of this type.

In *Monsanto Chemical Co. v. Sykes*[72] the lessee completed in March 1959, a discovery well in the Merit Oil Field immediately south of the complainant's property on which Monsanto also owned a lease. This well was completed in sands designated as the Paluxy and the Mooringsport, but the latter sand was depleted and the well in January 1961, began producing in 11,900 foot sand. On March 31, 1959, complainant informed the lessee that a well should be drilled on his property to prevent drainage. Drilling operations costing $318,000 were conducted by the lessee before efforts were discontinued in July 1959. In 1960 reworking operations were commenced on the same well with an additional cost of $165,000 and it was abandoned as a dry hole in January 1961. The lease on complainant's property was assigned to a third party who completed a commercial producer south-west of the dry hole in the 11,900 foot sand in September 1961. In June 1961, a west offset to complainant's tract was completed and in July 1961 an east offset followed with both producing from 11,900 foot sand. Complainant brought suit against Monsanto for failure to protect leased premises against drainage by its well on adjoining land. The lower court found that at the time drilling operations were first abandoned Monsanto knew that the tract was productive at a different location and that its reworking operation was not that of a prudent operator. In addition the court found that Monsanto's discovery well drained 85,362 barrels from the Paluxy sands under complainant's land from October 20, 1959

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[71] *Id.* at 18, 147 So. 2d at 118.

[72] 245 Miss. 207, 147 So. 2d 290 (1962).

(three months after drilling operations were first abandoned) to the date of the trial, and judgment was given accordingly against the lessee. On appeal the supreme court reversed the decree allowing damages holding that there was no liability for drainage of the Paluxy sands up to three months from January 25, 1962 (the date re-working operations were abandoned). The effort of Monsanto to produce oil from complainant's property was that of a prudent operator.

As in *Andreae,* the lessor attempted to substantiate his position by heavy reliance upon *Millette.* The court, however, pointed out its irrelevancy with the following language:

> We have carefully considered Millette and in the light of the facts in that case we conclude that it does not apply to this case. Two facts alone distinquish it from the present case. In Millette, the lessee did not spend any money in an effort to develop Millette's land and affirmatively prevented Millette from doing so himself or having others develop his land. No more need be said in order to distinguish Millette from the present case. We also find that Millette does not establish a rule of liability at all events when the lessee drains his lessor's lands. Nor did Millette abolish the prudent operator rule except that the said rule did not apply to the facts of that case. The application of Millette to the present case would be extending the Millette doctrine.[73]

VII. Conclusion

By the two recent decisions discussed above the Mississippi Supreme Court has narrowed the field of speculation as to the effect of the *Millette* cases, although it was unsuccessful in eliminating confusion in this area. It now seems clear that in Mississippi a common lessee of two adjoining tracts is not liable for all drainage from one tract through wells on an adjoining tract. In addition, the prudent operator rule is not inapplicable to every suit for recovery of compensation for drainage by a common lessee. However, this last point appears directly contrary to that portion of the opinion in the second *Millette* decision where the court seemed to say that the prudent operator rule was inapplicable to a case involving drainage by a lessee on an adjacent leasehold. Finally, in a factual situation similar to *Millette* acceptance of delay rental with knowledge of drainage and the existence in the lease of an express covenant to drill offsets will not bar recovery against the common lessee.

In both *Andreae* and *Sykes* the court emphasizes that the prudent operator rule is inapplicable only in a situation analogous to *Millette.* Thus, drainage caused by the lessee is not by itself sufficient to render the prudent operator rule inapplicable, but in addition the bad faith of

[73] *Id.* at 222-223, 147 So. 2d at 297.

the lessee is a necessary element. From a reading of the *Millette* cases it is not apparent that the lessor must show the bad faith of the lessee, and the principal cases relied upon by the court do not support such a view. Even after *Andreae* and *Sykes* the intended application of the term "bad faith" in this connection is indeed uncertain and perhaps left by the court for determination on the facts of each case.

The *Millette* doctrine also requires "substantial drainage"—a term as nebulous as "bad faith." In *Andreae* the court admits of this lack of clarity by requiring that the meaning of the term be found in the circumstances of each case. In *Andreae, Sykes,* and *Millette* the court's determination of the occurrence of substantial drainage seems to be predicated on the amount of recoverable oil beneath the lessor's land rather than the amount of oil drained from lessor's land.

In applying the *Millette* doctrine confusion and uncertainty surrounding the concepts of bad faith and substantial drainage are inevitable. This disorder makes the position of the lessee tenuous. It is submitted that the view of the *Millette* dissent is a sound solution—measurement of the duty of the lessee by the standard of the prudent operator in the absence of fraud.

Charles Ray Davis

PUBLIC PERFORMANCE FOR PROFIT THROUGH THE MEDIUM OF COPYRIGHTED MUSICAL COMPOSITIONS

I. Protection of the Creative Mind

Since the early stages of the Anglo-American legal system, the courts have acknowledged the existence of a right in each individual to the products of his mental labor. When these mental products or ideas were reduced to material objects, such as written words, or similar physical representations, the courts granted the creator redress against infringement. At common law the creator of an original work was protected only so long as it remained unpublished.[1] In 1710 the English Parliament passed the Statute of 8 Anne,[2] which was the first legislation designed to protect the rights of authors. That statute was the foundation from which all subsequent copyright legislation grew,[3] inasmuch as it granted the copyright owner protection for his published works provided he met the statutory requirements.[4] Neither the common law

[1]Mooney, *The Jukebox Exemption,* ASCAP Copyright Law Symposium Number Ten 194, 196 (1959) [hereinafter cited as Mooney].

[2]1709, 8 Anne, c. 19.

[3]Howell, The Copyright Law 2 (2d ed. 1948).

[4]Mooney 196.

copyright nor the Statute of Anne gave the owner protection against unauthorized performance of his work, but in 1833 the English Parliament gave the authors of dramatic works a remedy for performance of their works without permission.[5] It was not until 1842 that musical compositions were afforded similar protection against unwarranted performance.[6]

The development of copyright law in America followed much the same pattern. Recognition was given to the rights of authors or publishers of books by the following provision of the United States Constitution: "The Congress shall have the power . . . To promote the Progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[7]

The case of *Wheaton v. Peters* was the first copyright case to reach the U.S. Supreme Court.[8] In that case, decided under the Copyright Act of May 31, 1790,[9] the Supreme Court said that "an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication. . . ."[10] However, the Court went on to say that the copyright proprietor, who was a court reporter, had no common law rights in the reports after publication. Here the plaintiff failed to meet the statutory requirements under the existing act. The conclusion of the Court was that since the plaintiff published his works, he could no longer allege his common law rights, which pertained only to unpublished works.

II. Performance Rights and Their Development

A. General

In the United States the right of public performance of musical compositions was first granted to the holder of the copyright therein by the Act of January 6, 1897.[11] This protection covered all public performances, not merely those which were given "for profit." By the terms of the present Copyright Act,[12] which was enacted in 1909, the rights of the copyright proprietor are guarded against infringement only in the case of a violation by a performance "for profit."[13]

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[5]Bulwer-Lytton's Act, 1833, 3 & 4 Will. 4, c. 15.
[6]Literary Copyright Act, 1842, 5 & 6 Vict., c. 45.
[7]U.S. Const. art. I, § 8.
[8]11 U.S. (8 Pet.) 591 (1831).
[9]1 Stat. 124.
[10]Wheaton v. Peters, 11 U.S. (8 Pet.) 591, 657 (1831).
[11]29 Stat. 481.
[12]Copyright Act, 17 U.S.C. (1958).
[13]Howell, *op. cit. supra* note 3 at 131.

B. Under the Copyright Act

The Copyright Act grants to the copyright proprietor of a musical composition a monopoly over his ideas for a limited term of years. Under section 1(a) of the act he is entitled, "to print, publish, copy and vend the copyrighted work." In addition the copyright proprietor is given the authority under section 1 to make arrangements or adaptations of the work and to have it recorded for mechanical or electrical reproduction. Finally, by section 1(e) of the act, the copyright owner receives the right to perform the work publicly for profit. These rights, which are granted to the author of a musical work, are separate and distinct, and the release of a part of them by the author is not equivalent to a release of all of them. Thus, in the case of *Irving Berlin, Inc. v. Daigle* the court said:

> By the terms of the provision of Section 1(e), conferring on the proprietor of a copyrighted musical work the exclusive right of reproducing it mechanically, one who acquires that right by contract with the proprietor, or by complying with the prescribed requirements as to paying royalties, does not by such acts acquire the right of publicly performing for profit the copyrighted work.[14]

In much the same manner the courts have held that the publication and sale to the public by the copyright owner of his musical composition in the form of sheet music does not convey to the purchaser the right to publicly perform such work for profit, because these are distinct rights separately granted by the Copyright Act and the copyright owner may exercise either or both of them.[15]

C. What Constitutes "Public"

Further analysis of section 1(e) is necessary in the light of judical interpretation in order to determine the construction given to that provision by the courts. In a case decided only eight years after the passage of the Copyright Act, the defendant moved for a dismissal of the plaintiff's bill of complaint on the ground that the plaintiff's musical compositions were not written with the purpose of public performance in mind. The court in refusing to dismiss the bill said:

> I am inclined to think that, when the composer composed his composition with an unlimited copyright notice, it may be fairly inferred that he had written the work for the purpose of securing all the rights attainable under the Copyright Act including the exclusive right publicly to perform it for profit.[16]

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[14]31 F.2d 832 (5th Cir. 1929).

[15]See, *e.g.*, Interstate Hotel Co. v. Remick Music Corp., 157 F.2d 744 (8th Cir.), *cert. denied*, 329 U.S. 809 (1946).

[16]Hubbell v. Royal Pastime Amusement Co., 242 Fed. 1002 (S.D. N.Y. 1917).

In considering the meaning of the term "public" an English decision sets forth a concise definition. The case involved a suit by the copyright owner of a one act play—called "The Rest Cure"—against the president of a dramatic society for performing the play without permission before the Dunston Women's Institute.[17] The institute held monthly meetings of a social and educational nature for the purpose of encouraging music, drama and dancing. Since the work presented was a drama rather than a musical composition, there was no necessity to prove that the performance was "for profit," because there would be liability without the existence of a profit motive. The only persons present at the presentation of the play were the performers and the members of the institute. The court reached the conclusion that the performance was a public one and that the defendant was liable. The criterion used to determine that this was a "public" performance was the character of the audience, which the court said must be domestic or quasi domestic in order for the performance to be private. In reaching the conclusion that the performance was not domestic the court relied on the case of *Harms, Ltd. v. Martan's Club, Ltd.*[18] in which a performance before a private club was held to be public, partially because members of the club were allowed to bring guests. Approximately 150 members of the club and 50 guests were present on the occasion of the infringement. The court found that the playing of the plaintiff's copyrighted musical composition by the orchestra constituted a violation of the plaintiff's performance rights.

The courts in this country have considered the question of "public" performances in recent decisions. The copyright owner succeeded in a suit against a nonprofit corporation, which possessed many of the aspects of a private club, because the club opened its performances to members of the general public, who merely met the corporation's standard for appearance and behavior.[19] The apparent effect of such illusory standards for admission was that the club's performances were open to the general public, even though a nominal membership fee was charged. The court properly decided that the playing of the plaintiff's musical composition was a "public" performance. In a similar case in which a nonprofit corporation contended that it was a private social and athletic club, the copyright owner was allowed to recover for a breach of his performance rights where an orchestra played his music.[20] The only qualifications for admission to membership were that the applicant be twenty-one, a citizen and a person of "good standing." Obviously

[17]Jennings v. Stephens [1936] 1 All E.R. 409.

[18][1927] 1 Ch. 526.

[19]Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959).

[20]M. Witmark & Sons v. Tremont Social and Athletic Club, 188 F. Supp. 787 (D. Mass. 1960).

these standards were so general in nature as to make them illusory which resulted in granting admission to the public at large.

D. "Performance"

In continuing the discussion of the provisions of section 1(e), the question arises as to what quantity or amount of reproduction of a copyrighted work is sufficient to constitute an infringement. Is it necessary that the violator perform the entire work before he can be held liable? This question has been answered by the courts in the negative. The question was considered in an action involving the playing of a chorus of a copyrighted song on an organ during the showing of a silent movie. The theater was found liable even though the organist used her own discretion in choosing the songs. The court concluded that the playing of only the chorus of the song amounted to a substantial and material part of it and therefore met the requisites of a "performance."[21]

The English court in the case of *Hawkes v. Paramount Film Service, Ltd.* considered the quantity of infringement necessary to constitute a "performance."[22] In determining that the inclusion of twenty-eight bars of the plaintiff's copyrighted march in a newsreel without permission amounted to an infringement, the court said, "[Where] one deals with the word 'substantial,' it is quite right to consider whether or not the amount of the musical march that is taken is so slender that it would be impossible to recognize it."[23] The march was played by a school band during a dedication ceremony, and the music was heard for only twenty seconds during the newsreel.

E. "For Profit"

The final element in the case of a musical composition which must be proved in order to permit the copyright owner to recover is that the unauthorized performance was "for profit." This requirement has been treated somewhat liberally by the courts in order to insure protection to the copyright owner. Thus, it has been held that the playing of a copyrighted song by an orchestra in a night club was "for profit" even though there was no admission, no cover charge, and no minimum.[24] The basis for this holding was that the music was an attraction which brought in customers who in turn purchased drinks from the club.

When suit was brought against a nonprofit radio station for the unlicensed broadcast of a copyrighted musical composition, the defendant asserted as a defense that the use of the music which had been

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[21]M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924).

[22][1934] 1 Ch. 593.

[23]*Id.* at 604.

[24]Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959).

recorded was not a performance "for profit."[25] The court found that the station devoted one-third of its time to advertising programs and used the income therefrom to meet operating expenses. It therefore concluded that where the music was used on a sustaining program such use amounted to a performance "for profit," and that it was unimportant whether a profit went to the radio station or its employees or to the advertisers. The same conclusion was reached where the defendant, a department store, operated its own radio station for advertising purposes and broadcast the copyrighted song "Mother Machree" without permission.[26] The department store charged off the cost of operating the station as a business expense. Nevertheless, under the provisions of the Copyright Act the performance was found to be "for profit," especially where the programs were preceded by the statement of the name of the department store and its slogan.

III. Exemption from Liability for Performance

A. The Jukebox Exemption

One of the most controversial provisions of the Copyright Act is the last paragraph of section 1. This paragraph exempts from liability performances of musical compositions which are rendered by or upon coin-operated machines. The paragraph under consideration reads as follows: "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."[27] At the time of the enactment of the Copyright Act it was understandable that the "penny parlors," as they were called, should be exempt from the payment of royalties to the copyright owner, since at that time coin-operated record players were in their infancy and the revenue they produced was insignificant.[28] However, with the growth and development of the jukebox the original reasons for the exemption have become obsolete, and in a period of rapidly changing taste in popular music the contention that the penny parlors serve as an advertising medium for the musical composition is no longer true. Extensive repetition of a song on a jukebox does not popularize it; rather, it shortens its life by "playing it to death."[29] Although conscientious efforts have been made to bring about a legislative repeal of the jukebox exemption such efforts have thus far been unsuccessful. The result of this anachronism is that the

[25]Associated Musical Publishers, Inc. v. Debs Memorial Radio Fund, 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 726 (1944).

[26]Copyright Act, 17 U.S.C. § 1 (1958).

[27]M. Witmark & Sons v. L. Babmerger & Co., 291 Fed. 776 (D. N.J. 1923).

[28]Mooney 203.

[29]Mooney 208.

copyright owner is deprived of his just proportion of income from the performance of his musical creation.

B. Performance of Secular or Religious Works in a Manner Which Is "Not for Profit"

Another express exemption which is granted by section 104 relieves those who perform a copyrighted musical work of liability under specified conditions. The exemption reads as follows:

> Provided, however, that nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratories, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.[30]

The gratuitous public performance of certain sacred or secular works obtained from the sources mentioned in section 104 is considered "fair use" and therefore not an infringement of the owner's copyright.[31] In a Canadian case involving a similar statutory provision which stated that an organization would not be liable where the public performance was rendered "in furtherance of a religious, educational or charitable object," the defense was that the defendant fell under the statutory exception.[32] The defendant, a Kiwanis Club, purchased an old mansion and held dances in it to raise money for charitable purposes. The orchestra, which received pay for its work, played copyrighted compositions to which the plaintiff held performance rights. The court in finding the Kiwanis Club liable said the terms "in furtherance of" a charitable object means that this must be a participating factor in the charitable object itself or in any activity incidental to it; but it could not be said to be so associated with the object here by its role in the ordinary business entertainment of a dance, there being neither a participating in the object nor in anything incidental to it.

IV. Expansion of Performance Rights

A. Radio

With the growth and development of new communication methods and advertising media, performance rights became infinitely more valuable to the copyright owner. There was some question at the outset

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[30]Copyright Act, 17 U.S.C. § 104 (1909).

[31]Ball, Law of Copyright and Literary Property 60 (1944) [hereinafter referred to as Ball].

[32]Composers, Authors and Publishers Associated of Canada, Ltd. v. Kiwanis Club, [1953] Can. Sup. Ct. 111.

whether performance rights should be protected in systems of communication which were not in use at the time of the passage of the Copyright Act. However, in a case involving the use of copyrighted songs on radio broadcasts which were interspersed with advertisements, the court said, "The statute [Copyright Act] may be applied to new situations, not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning."[33] Thus, the first hurdle was cleared and the way opened for the expansion of performance rights to their ultimate potential. The fact that the original broadcaster has a license from the copyright owner to broadcast the musical composition does not entitle the receiver of the broadcast to perform it for profit. One actual performance of a copyrighted selection may result in as many additional performances as there are radio receptions of that particular piece in a public place for profit, with a consequent liability for infringement for each unlicensed public reception.[34] The intention to infringe is not an essential element in order to find the violator liable.[35] Both the English[36] and American[37] courts have determined that an infringement of performance rights occurred when hotel owners reproduced radio broadcasts by the use of loudspeakers for the enjoyment of their guests.

B. Motion Picture Performance

In discussing performance rights in motion pictures it must be remembered that the copyright owner has not just one right, but a bundle of them, and among these are the right to copy, to record, to make arrangements, and to perform the work for profit. Even though the owner releases one or some of these rights to another he is still entitled to redress for a violation of those rights which were not released. Thus, in the case of motion pictures where a copyright owner grants to the producer of a movie the right to copy his musical composition on film, he may still recover where the film is presented in a public performance for profit without his permission.[38] Similarly, a film company will be held liable where it includes only a part of a copyrighted song in a newsreel without the authorization of the copyright owner.[39]

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[33]Jerome H. Remick Co. v. American Automobile Accessories Co., 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925).

[34]Ball 429.

[35]See Jerome H. Remick & Co. v. General Electric Co., 16 F.2d 829 (S.D.N.Y. 1926).

[36]See Performing Right Soc'y v. Hammond's Bradford Brewery Co., [1934] 1 Ch. 121.

[37]Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937).

[38]Famous Music Co. v. Mels, 28 F. Supp. 767 (W.D. La. 1939).

[39]See Hawkes v. Paramount Film Serv., Ltd., [1934] 1 Ch. 593.

C. Restaurant, Dance Hall and Night Club Performance

The case of *Herbert v. Shanley Co.*[40] was the foundation out of which the protection of performance rights grew. The question involved was whether or not the defendants, restaurant and hotel owners, were liable where they hired performers to sing copyrighted songs. Right of recovery turned on whether these were performances "for profit." The performances took place while meals were served to the patrons. Mr. Justice Holmes, in holding for the copyright proprietors, said, "If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is for profit and that is enough."[41] The owner of the restaurant, dance hall or night club is held liable for violations of performance rights by an orchestra regardless of whether or not he chooses the songs to be played.[42] Under more recent cases the courts have recognized the liability of restaurant owners in situations where the music is transmitted to the restaurant by means of private telephone lines and played in the dining area.[43] Little distinction regarding the issue of liability is made between the type of establishment in which the alleged copyright violation has occurred. It seems that the criteria are that, (1) the performance be public and (2) the performance be for profit.

D. In Connection with Commercial Enterprises

Music found its place in the field of advertising with the advent of radio and television. Following a policy of expanding the protection under the Copyright Act to fit the changing needs of society, the courts have concluded that singing commercials are entitled to protection from infringement just as any other musical composition.[44] In a somewhat different vein music has been employed as a means of improving the working conditions in shops and factories in an effort to increase the productive capacity of the individual worker. An English court in a case involving the playing of music over loudspeakers scattered throughout the factory reached the conclusion that such acts amounted to an infringement.[45] The court determined that the audience was public rather than private because it was a non-domestic group, and therefore the plaintiff was entitled to recover.

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[40]242 U.S. 591 (1917).

[41]*Id.* at 595.

[42]See Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929).

[43]See, *e.g.*, Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Penn. 1956).

[44]See, *e.g.*, Robertson v. Batten, Barton, Durstins & Osborn, Inc., 146 F. Supp. 795 (S.D. Cal. 1956).

[45]Earnest Turner Electrical Instruments, Ltd. v. Performing Right Soc'y, Ltd., [1943] Ch. 167.

V. Protection of Performance Rights

A. ASCAP as a Protection

Shortly after the passage of the Copyright Act of 1909, there was a realization by composers and publishers that they lacked an adequate means of enforcing the performance rights which had been granted them. Through the efforts of Nathan Burkan, a member of the New York bar, the American Society of Composers, Authors, and Publishers was organized in 1914. The purpose for creating the society was to protect public performing rights in musical works copyrighted by members of the society against infringement by public performance thereof for profit by unlicensed persons.[46] The motivating principle in so far as the participation of copyright owners was concerned was the belief that they would be able to succeed in a collective effort in protecting their performance rights where they would fail as individuals.

The society functions in the following manner. Members make assignments of their performance rights to ASCAP for a period of five years. By a reciprocal agreement with foreign performing rights societies ASCAP acquires the exclusive right to license the public performances for profit in the United States of all members of foreign societies. Conversely, the foreign societies are given the exclusive right to license within their respective countries the public performances for profit of copyrighted musical compositions of members of ASCAP.[47] Under the society's plan of operation, the United States is broken down into districts, and auditors are employed in each district to observe wherever music is performed in public places[48] and report violations. When an infringement occurs the violator is usually notified through a local attorney that he must pay the license fee or face litigation. A license may be obtained from ASCAP covering the entire repertory of musical compositions to which ASCAP is licensee upon the payment of a certain sum based on the character of the establishment, the probable extent of use, and its capacity to pay. In other words, the cost of the license to an operator who uses copyrighted musical compositions is based on what the traffic will bear.[49] To be more specific, the licensing fee is usually dependent upon the seating capacity of theaters, the income, power and range of radio broadcasting stations, and the size, income and standing of hotels, dance halls, and other places of public entertainment, and upon the number and size of the orchestras which they employ.[50]

From its infancy down to the present time ASCAP has been attacked as being monopolistic in nature and therefore in violation of the

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[46]Ball 415.
[47]*Id.* at 415-16.
[48]Howell, *op. cit. supra* note 3, at 131.
[49]*Id.* at 132.
[50]Ball 415-16.

antitrust laws. In an early action brought by a corporation which operated a silent movie theater, an injunction was sought against ASCAP on the grounds that it was an illegal combination in restraint of trade.[51] The decision rendered by the court was that there was nothing unlawful about the actions of ASCAP, and that it in no way acted in restraint of trade, because the plaintiff remained free to use any music in which the defendant was not licensee. Since that time attempts have been made in many states to prohibit ASCAP from operating within the state or to limit its power by enactment of statutory regulations. The effectiveness of this type of state legislation was put to the test in suits brought by ASCAP seeking injunctive relief from the enforcement of Florida[52] and Nebraska[53] statutes which declared combinations of authors, composers, publishers and owners to be in restraint of trade. Mr. Justice Black denied the injunction in both cases and in discussing the Florida case said,

> . . . unless constitutionally valid federal legislation has granted to individual copyright owners the right to combine, the state's power validly to prohibit the proscribed combinations cannot be held non-existent merely because such individuals can preserve their property rights better in combination than they can as individuals. We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws.[54]

In general, state regulatory statutes controlling performance rights societies are of four categories. The first type of statute states that all contracts in violation of the statute are void and that compositions may be performed within the state without regard to copyrights controlled by violators of the act. A second type state statute does not entirely prohibit price fixing but allows performance rights societies to do this only on a per piece basis. A third type of state regulation requires that combinations have a license to do business in the state. This type statute demands the filing of detailed inventories in order to obtain a license and in addition it imposes a tax on gross receipts of the combination received in the state. The fourth method of state regulation imposes a substantial lump-sum occupational tax on the business of collecting license fees within the state.[55] The courts have upheld the constitutionality of the state statutes based on their police powers unless the statute denies to the copyright owner rights which were given to him by the Copyright Act. In following this line of thought the court

[51] 174th St. & St. Nicholas Av. Amusement Co. v. Maxwell, 169 N.Y. Supp. 895 (1918).

[52] Watson v. Buck, 313 U.S. 387 (1941).

[53] Marsh v. Buck, 313 U.S. 406 (1941).

[54] Watson v. Buck, 313 U.S. 387, 403 (1941).

[55] Ball 416-19.

in a Nebraska case allowed the copyright owners to recover in an action for infringement of their performance rights, even though they were members of ASCAP which was prohibited by statute from engaging in business in Nebraska.[56] Recovery was allowed because such rights were specifically granted by the Copyright Act and because ASCAP was not a party to the action, had no interest in the copyrights infringed, and had not engaged in the transaction of any business in Nebraska at the times material. A publisher recovered for an infringement in spite of a Wisconsin statute which required that one who wished to issue license for the performance of musical numbers must obtain a license from the state and also which permitted only the composer of the song to bring suit.[57] There was conflict between the statute and the Copyright Act, as the latter permits the bringing of suits by the copyright proprietor, who is not necessarily the composer. Therefore recovery was granted under the Copyright Act. The court made the following statement:

> Since infringement is a . . . tort and failure to comply with a state licensing statute does not bar recovery in an ex delicto action. . . . we do not think the plaintiff's failure to obtain a license to do business in Wisconsin placed it [the plaintiff] outside the protection of the law so that a resident of Wisconsin could take its property without any legal right to do so. To so hold would be to sanction the confiscation of the plaintiff's property.[58]

Since shortly after the Supreme Court rendered the two decisions in which it upheld the Florida and Nebraska statutes controlling performance rights societies, ASCAP has been subject to an antitrust consent decree.[59] As a result of the case of *Alden-Rochelle, Inc. v. ASCAP*,[60] the consent decree was modified in 1950. In that case ASCAP was prohibited from withholding from motion picture producers the right to perform the musical composition for profit and then requiring theater owners to pay annual blanket licensing fees in order to perform the movies containing the copyrighted music for profit. Such procedure was found to be in violation of the antitrust laws. The consent decree was again amended in 1960.

VI. Conclusion

Despite certain setbacks, the future for performing right societies holds the promise of new growth and expansion. Scientific development has led us into a new era of communication in which the whole world is

[56]Interstate Hotel Co. v. Romeo Music Co., 157 F.2d 744 (8th Cir.), *cert. denied*, 329 U.S. 809 (1946).

[57]Lee Feist, Inc. v. Young, 138 F.2d 972 (7th Cir. 1943).

[58]*Id.* at 975.

[59]See Howell, *op. cit. supra* note 3, at 136.

[60]80 F. Supp. 888 (S.D.N.Y. 1948).

literally our stage. With the perfection of intercontinental television, ASCAP and its counterparts will be faced with new problems and possibilities. The decrease in the average working hours of the individual will give him more time to enjoy the various types of entertainment in which musical performance rights are involved. The present predictions of an astounding increase in the world's population is still another factor which should lead to the expansion of performing right societies.

ASCAP and its counterparts are charged with the responsibility of protecting the property rights of their licensors from illegal confiscation by performance without authorization. They have additional duties of determining the license fees to be charged to operators who use the copyrighted compositions. In applying the rule that license fees should be based on what the traffic will bear, ASCAP will do well to remember the nursery rhyme of the goose that laid the golden egg. Clearly the operators who control the various communication and entertainment fields represent this legendary goose, and only if they succeed will ASCAP and its counterparts succeed. Only through a policy of mutual respect and understanding between performing right societies and the users of copyrighted music will the property rights of the individual who created the musical composition be best protected.

Lloyd G. Spivey, Jr.

Recent Decisions

Conflict of Laws—Interspousal Torts—Law to Govern

Plaintiff, a passenger in a motor vehicle operated by her husband, brought an action against him in New Hampshire for alleged gross negligence resulting in an accident in Massachusetts. Under New Hampshire law a wife may sue her husband in tort,[1] but under Massachusetts law, she cannot do so.[2] The trial court dismissed the action on the ground that the wife's right to recover against her husband for a tort committed in another jurisdiction is determined by the law of that jurisdiction. Held: Reversed and remanded. The right of one spouse to sue the other for personal injuries is to be determined by the law of the state of the domicile. *Thompson v. Thompson,* 193 A.2d 439 (N.H. 1963).

The common law viewed the legal existence of the wife during marriage as having been incorporated or consolidated into that of the husband.[3] The husband and wife were regarded as one person, and therefore neither could maintain any civil action against the other.[4] Beginning about 1844 Married Women's Acts were passed in many jurisdictions giving married women a separate legal entity.[5] These acts have generally been construed as allowing a wife the right to maintain an action against her husband for torts against her property but not for personal torts.[6] Although the majority of jurisdictions do not allow interspousal tort suits,[7] a strong minority of jurisdictions now do so.[8] Mississippi is representative of the majority view since it has consistently denied tort suits between husband and wife for personal torts.[9] A conflict of laws question therefore arises when an interspousal tort is committed in a jurisdiction which does not allow the maintenance of interspousal tort suits but where the suit is brought in the state of the domicile which does allow one spouse to sue the other for personal torts or injuries. The state of the forum, which is usually the state of the domicile, must then decide whether to apply the law of the state where the wrong was committed or whether to apply its own law. The general rule is that the creation and extent of tort liability is determined by the law of the place where the alleged tort was committed.[10] Most American courts have held that the law of the place where the wrong was committed shall govern regardless of the law of the forum.[11]

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[1]Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657 (1915).

[2]Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948).

[3]1 Blackstone, Commentaries *442.

[4]Prosser, Torts § 101 (2d ed. 1955).

[5]*Ibid.*

[6]*Ibid.*

[7]Ehrenzweig, Conflict of Laws § 221 (1962).

[8]See Prosser, Torts § 101 (2d ed. 1955).

[9]Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955).

[10]Goodrich, Conflict of Laws § 92 (3d ed. 1949).

[11]Stumberg, Conflict of Laws 181-82 (3d ed. 1963).

Several viewpoints have been adopted by the majority in support of their decision that the law of the place should govern. One view is that courts tend to give effect to foreign law and instead of creating a right in accordance with their own laws, give effect to rights created by the proper foreign law, which is the law of the place where the tort occurred.[12] Some courts hold the viewpoint that the disability of one spouse to sue the other is not merely a prohibition of the maintenance of a suit, but that because of the marital relationship no cause of action ever came into existence.[13] Therefore, a court may apply the *lex loci* since it will refuse to ignore foreign law affecting the substantive rights of the parties.[14] Another reason why interspousal suits have been generally governed by the law of the place of the wrong is that the courts hearing these cases have characterized the action as one of tort[15] and not one of domestic relations. This reasoning is being abandoned by some courts, and they are adopting the view that the disabilities to sue and immunities from suit are more properly matters of family relationship than tort and that the law of the state of the family domicile should therefore control.[16] It is only logical that the state of the domicile has the greatest interest in creating and regulating the incidents of the marital relationship,[17] and the disabilities and immunities created by the family relationship should not change every time members of the family cross state boundaries.[18] The tentative draft of the Restatement (Second), Conflict of Laws, Section 390g provides that the law of the state of the domicile should be determinative as to one spouse's right to sue the other in tort, a significant change from the position formerly taken by the Restatement.[19] Many legal writers now classify interspousal tort suits as suits arising from the family relationship and advocate that the law of the domicile should control,[20] and at least four jurisdictions now apply the law of the domicile in interspousal tort suits.[21]

With the widespread use of liability insurance it is only logical that the old arguments against the maintenance of interspousal tort suits should disappear. Because of this insurance there is, in most instances, no longer a threat to the peace and harmony of the home by the allowance of these suits. It should be noted that many older decisions and also some recent ones have refused to allow interspousal tort suits upon the ground that the peace and harmony of the home might be disrupted. Since most interspousal tort suits now arise because of the

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[12]*Id.* at 184.

[13]*E.g.*, Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637, 638 (1948).

[14]See Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943).

[15]See Annot., 22 A.L.R.2d 1248 (1952).

[16]Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218, 223 (1955); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34, 40 (1958).

[17]Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218, 223 (1955).

[18]*Ibid.*

[19]Thompson v. Thompson, 193 A.2d 439 (N.H. 1963).

[20]See *Ibid.*

[21]Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958); Pittman v. Deiter, 10 Pa. D. & C.2d 360 (1957); Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

fact that the spouse being sued carries liability insurance, it is possible that the peace and harmony of the marital relationship might be disrupted by the court's *refusal* to allow these suits. It is not unreasonable for the state of the domicile to exercise control over its residents even when they journey into another state. This control may be exercised so as to allow its courts to recognize that a cause of action arose between the parties even though they were in a state which would not have recognized a cause of action under the same circumstances. It is evident that the principles involved in interspousal tort suits properly belong to the law of domestic relations, and under this law the rights, immunities and disabilities of the family are determined by the law of the state of the domicile. There is little, if any, reason for a state which has adopted the better and more modern rule to give effect to the obsolete interspousal tort immunity as observed by the foreign state, in place of its own law, especially when it is the state most interested in the rights of the parties.

John A. Travis, III

Constitutional Law—Freedom of Religion Affecting Jury Duty

Relator was called for jury duty in a state court and selected to sit on a civil case. The relator refused to serve on the ground that it was against her religious beliefs to sit in judgment on another, and the court found her guilty of contempt. Held: Affirmed. Contempt conviction of a juror who refused to serve because of religious belief in a literal application of Biblical scripture "judge not, so you will not be judged" was not violative of the juror's constitutional rights under either the state or federal constitutions. *In re Jenison,* 120 N.W.2d 515 (Minn. 1963).

The provisions of the first amendment prohibiting a law respecting the establishment of religion or denying the free exercise thereof is a fundamental concept of liberty made applicable to the states by the fourteenth amendment.[1] Neither a state nor the federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[2] However, actions which are violative of social duties or subversive of good order may be reached by Congress.[3] Governments cannot interfere with one's relations to his maker, the obligations he may think they impose and the manner in which an expression of such beliefs may be made provided that there is no infringement on the laws of society designed to secure its peace, prosperity, and moral welfare.[4] The right to practice religion does not include liberty to expose the community or an inhabitant to communicable disease or to bring upon the latter ill health or death.[5]

[1] *E.g.,* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[2] *E.g.,* Everson v. Board of Educ. 330 U.S. 1 (1947).

[3] See Reynolds v. United States, 98 U.S. 145 (1878).

[4] *E.g.,* Davis v. Beason, 133 U.S. 333 (1890).

[5] Prince v. Massachusetts, 321 U.S. 158 (1944).

It has been held that the state has a wide range of power for limiting parental freedom and authority in things affecting a child's welfare and such power includes to some extent matters of conscience and religious conviction.[6] Thus, freedom of worship is susceptible of restriction to prevent grave and immediate danger to interests which the state may lawfully protect.[7] Moreover, the general regulation, in the public interest, of solicitation which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to constitutional objection, though collection be for a religious purpose, and such regulation would not constitute a prohibited restraint on free exercise of religion.[8]

The problem of balancing the interests of the state and the right of the individual to the freedom of religion would seem to be a decisive one in each case. The public interest in peace, good order, and morals would seem to be paramount. For instance, it has been held that the mere fact that one's church enjoins polygamy upon its male members can not be set forth as a religious belief justifying the committing of an overt act which has been decided to be against desirable social conditions and therefore criminal.[9] Refusal of a state to admit a conscientious objector to the practice of law was not a denial of religious freedom under the Constitution when such person espoused a refusal to use force to prevent wrong or a refusal to act in a police force to coerce threatened violence.[10] Indeed, there is no constitutional right to exemption from military service, although Congress may grant a privilege of exemption to conscientious objectors.[11] However, a resolution of a state board of education requiring children to salute the American flag and give the pledge of allegiance thereto as a prerequisite to continued attendance, has been held invalid as to children of Jehovah's Witnesses in that it denies freedom of worship.[12] But a contention that the National Prohibition Act[13] was a deprivation of free exercise of religion as to a Jewish family, by restricting use of sacramental wine, has been considered without merit.[14] An earlier case in a federal district court held that a juror, who refused to perform jury duty because of religious convictions was relieved of that obligation under the terms of the first amendment.[15] In that case the doctrine was set forth that in matters of religion no right of man can be abridged by the civil society. In a historical analysis of the background which prompted the first amendment it was suggested that religion was wholly exempt from cognizance by the civil law. It was the opinion of the court that officers could interfere with a religious activity only when its principles lead to overt acts against peace and good order.

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[6]*Ibid.*

[7]West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

[8]Cantwell v. Connecticut, 310 U.S. 296 (1940).

[9]Reynolds v. United States, 98 U.S. 145 (1878).

[10]*In re* Summers, 325 U.S. 561 (1945).

[11]*E.g.*, Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952).

[12]West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

[13]Ch. 85, 41 Stat. 305, 307 (1919).

[14]Shapiro v. Lyle, 30 F.2d 971 (W.D. Wash. 1929).

[15]United States v. Hillyard, 52 F. Supp. 612 (E.D. Wash. 1943).

In the noted case previous holdings[16] which stated that freedom of religion was not an absolute right were followed. It was concluded that the act of the juror offended the peace, safety, good order and morals of the community. Such an attitude, the court said, would invite the erosion of every other obligation a citizen owes his community and his country. A previous case[17] was followed which stated that jury service is not a matter of choice, or right, but is a duty, imposed by the state. Indeed, reasoned the court, if the conduct of the relator were to be allowed the effectiveness of the jury system would be destroyed. The argument of the court would seem to be the more equitable interpretation of the freedom of religion clause of the first amendment. It was never intended or supposed that the first amendment could be invoked as a protection against legislative punishment for acts inimical to the peace, good order, and morals of society.[18] The relator was held in contempt because of an act, not for having an opinion. While one's freedom to believe may be absolute, his freedom to act is not.[19] Thus, it is felt that the court in the noted case applied the better doctrine that the first amendment is not absolute but must be read in light of the right of a state to safeguard the peace, health and well being of the community and of its institutions.

Taylor Byrd Smith

EVIDENCE—EXPERT TESTIMONY MAY INVADE PROVINCE OF JURY

Two vehicles collided at a street intersection and since both drivers later suffered from amnesia, neither was able to recall how the collision occurred. Based on evidence as to location of debris and location and angle of vehicles after collision and photographs introduced in evidence, an expert witness testified as to his conclusion of driver responsibility for the accident. HELD: Reversed. Opinion as to the responsibility for the collision invades the province of the jury so as to violate the right of trial by jury guaranteed by the state constitution.[1] *Hagan Storm Fence Company v. Edwards,* 148 So. 2d 693 (Miss. 1963).

Several theories have been developed concerning the opinion rule. For example, it has been urged that the true theory is simply exclusion of supererogatory evidence.[2] The well known theory that opinion can never be received when it touches the very issue before the jury has been criticized as being too broad because it denies needed aid to the jury and too narrow because it could admit opinion which should be

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[16]See, *e.g.*, Davis v. Beason, 133 U.S. 333 (1890).

[17]Maricopa County v. Corp, 44 Ariz. 506, 39 P.2d 351 (1934).

[18]See, *e.g.*, Davis v. Beason, 133 U.S. 333 (1890).

[19]*E.g.*, United States v. Ballard, 322 U.S. 78 (1944).

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[1]MISS. CONST. art. 3, § 26.

[2]7 WIGMORE, EVIDENCE § 1918 (3d ed. 1940).

inadmissible.[3] In Mississippi, the court has said previously by dicta that where the facts can be presented by direct evidence in such a manner that the trier of fact can have an adequate basis for formulation of the decision without extraneous assistance, opinion evidence should not be admitted.[4] Opinions of police officers and highway patrolmen as to the cause of vehicular accidents have been rejected in previous cases in this state.[5]

In the instant case, the Mississippi Supreme Court has joined the minority holding that skilled or expert opinion evidence as to the point of impact or collision is not admissible because it is of the kind which invades the province of the jury.[6] The majority rule has been expressed in a case remarkably similar to the case at bar, where both drivers had been killed and there were no other witnesses.[7] After permitting testimony of an expert, it was said that whether his conclusions were reasonable deductions from the known facts in evidence was properly for the determination of the jury.[8] In both cases, it would appear that the expert witnesses drew their conclusions upon the assumption that neither driver exercised steering control of his vehicle. Such an assumption might have been true but it militates against all experience.[9] The court in the instant case also remarked that, although the expert witness had testified a number of times in Louisiana, the state supreme court had not reviewed any of the cited cases.[10] It is interesting to note that in one of these cases comment was made that, although the facts as testified to by five eye witnesses were not substantially in conflict, the testimony of the two experts was in hopeless conflict.[11]

It is believed that the result in the case at bar is correct. But it is submitted that the majority rule is preferable and could well have been used by the lower court to reach the same result. In situations where there are no witnesses as to the movement of vehicles and opinion testimony is admitted which is based on the assumption that both vehicles are in effect unmanned, opposing counsel may by the use of other experts and by vigorous cross-examination rebut such evidence. Opposing counsel may also request that the jury give such credit to the expert testimony, if any, as it thinks the testimony deserves.[12] The jury can finally form its own opinion as to the correct interpretation of the evidence.

W. P. Starnes

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[3]*Id.* at § 1921.

[4]Illinois Cent. R.R. v. Williams, 242 Miss. 586, 135 So. 2d 831, 834 (1961).

[5]*E.g.*, Schumpert v. Watson, 241 Miss. 199, 129 So. 2d 627 (1961).

[6]Annot., 66 A.L.R.2d 1048, 1950 (1959).

[7]Leeper v. Thornton, 344 P.2d 1101 (Okla. 1959).

[8]*Id.* at 1106.

[9]Hagan Storm Fence Co. v. Edwards, 148 So. 2d 692, 701 (Miss. 1963) (concurring opinion).

[10]*Id.* at 695.

[11]Randall v. Baton Rouge Bus Co., 114 So. 2d 98, 105 (La. Ct. App. 1959).

[12]Baker, *Scientific Reconstruction of Automobile Accident*, 25 Ins. Counsel J. 439, 452 (1958).

FEDERAL PROCEDURE—DISCOVERY OF LIABILITY INSURANCE INFORMATION IN AUTOMOBILE NEGLIGENCE ACTIONS

This was an action to recover damages for injuries sustained in an automobile collision. During pre-trial examination, plaintiff sought to compel defendant to disclose the limits of his liability insurance policy in response to an interrogatory calling for such information. HELD: Rule 26(b) of the Federal Rules of Civil Procedure does not permit discovery of insurance coverage in negligence action in which liability insurance is not evidentiary matter. *Bisserier v. Manning*, 207 F. Supp. 476 (D.N.J. 1962).

The courts are in agreement that the deposition-discovery rules must be broadly and liberally construed[1] and generally, any relevant matter, not privileged, is subject to discovery under Rule 26(b) of the Federal Rules of Civil Procedure.[2] This rule requires only relevancy to the subject matter, and not to the precise issues presented by the pleadings.[3] Since the term "relevant" as used in Rule 26(b) is not synonymous with relevancy as a criterion for determining the admissibility of evidence, the question of relevancy is more loosely construed upon pre-trial examination than at the trial.[4] But discovery is not without limitations. The Supreme Court has indicated that limitations inevitably arise under Rules 30(b) and 31(d) when the examination is conducted in bad faith or so as to annoy, embarrass, or oppress the deponent.[5] Also, Rule 26(b) limits the examination to unprivileged matter.[6]

There is a conflict of authority in both federal and state courts with regard to the right of discovery of insurance information prior to judgment in a personal injury action. Cases permitting discovery rely on the broad viewpoint that this information may be generally relevant to the subject matter of the pending litigation.[7] Reliance is often placed on the state's motor vehicle financial responsibility laws, as evidence of a public policy providing compensation for injured persons, and thus giving the plaintiff a discoverable interest in the policy.[8] One court has taken a practical approach by stating that "plaintiff's knowledge of defendant's insurance permits a more realistic appraisal of a case and undoubtedly leads to settlement of cases which otherwise would go to trial."[9] Other jurisdictions that hold liability insurance information discoverable have taken cognizance of the fact that since the insurer takes control of the defense of any action brought against the insured the plaintiff should have knowledge of the existence of insurance in order to prepare for the case and to be appraised of his real adversary.[10] Cases denying discovery generally recognize the

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[1]*E.g.*, Hickman v. Taylor, 329 U.S. 497 (1947).

[2]See 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647 (Wright ed. 1961).

[3]*E.g.*, Lewis v. United Air Lines Transport Corp., 27 F. Supp. 946 (D. Conn. 1939).

[4]See, *e.g.*, Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50 (S.D.N.Y. 1951).

[5]Hickman v. Taylor, 329 U.S. 497 (1947).

[6]See *ibid.*

[7]*E.g.*, Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948).

[8]See, *e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961).

[9]Hill v. Greer, 30 F.R.D. 64, 66 (D.N.J. 1961).

[10]See, *e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961).

broad scope of the federal rules but contend that since the insurance question is not evidentiary matter, the information requested is not relevant to any present issue, nor can it lead to the discovery of admissible evidence.[11] These cases often consider that the plaintiff's reasons for acquiring this information are considerably outweighed by the defendant's right to privacy and his right to refrain from disclosing his financial affairs.[12] Moreover, if the defendant could be compelled to reveal the coverage of his liability insurance all of his other assets should be subject to discovery.[13] However, even those jurisdictions that deny the discoverability of insurance information recognize that there are instances in which such information would be relevant to the subject matter and thus discoverable. One court permitted discovery of defendant's insurance policy for the purpose of allowing the plaintiff to establish whether the defendant was an employee or an independent contractor.[14] Other cases recognize that discovery could be allowed where medical payments[15] or punitive damages[16] were involved.

The instant case follows those jurisdictions which deny that the discovery of liability insurance in automobile negligence cases is within the scope of Rule 26(b). Since the rule only limits the examination by the rule of relevancy, and since the courts are in sharp conflict whether this insurance information is relevant, it appears logical to refer to Rule 1 which provides that the rules are to be construed so as to provide for a speedy determination of every litigation.[17] If it is admitted that one of the purposes of the federal rules is to induce pretrial settlements,[18] this decision appears to restrict this result. Also, if doubt should exist whether certain information is discoverable, it would be more in accordance with the spirit of the rules to allow the examination, for the interests of both parties can be protected at the trial by proper rulings as to the relevancy of the material offered.[19]

Alex A. Alston, Jr.

Federal Tax Lien—in Competition with Subsequent Non-Federal Tax Lien

In 1946, the Buffalo Savings Bank made a loan secured by a real-estate mortgage; in 1953, the United States filed notice of a tax lien against the mortgagor's property; in 1957 and 1958, liens for unpaid real-estate taxes and other local assessments attached to the property; and, later in 1958, the Buffalo Savings Bank instituted foreclosure proceed-

[11] *E.g.*, Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962).

[12] See, *e.g.*, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962).

[13] See, *e.g.*, Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).

[14] Phyler v. Gordon, 25 F.R.D. 170 (D.N.J. 1960).

[15] See, McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952).

[16] Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (E.D. Tenn. 1951).

[17] See 2A Barron & Holtzoff, Federal Practice and Procedure § 647.1 (Wright ed. 1961).

[18] See Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

[19] See Grinnell Co. v. National Bank of Far Rockaway, 2 F.R.D. 116 (E.D.N.Y. 1941).

ings. Consonant with state law,[1] which labeled local taxes and assessments "expenses of the sale," the New York Court of Appeals held that the federal tax lien attached only to the mortgagor's interest in the surplus, after the foreclosure sale, and therefore was subordinate to the local taxes. HELD: Reversed. The priority of federal tax liens over subsequently accruing liens for local real-estate taxes cannot be avoided by the formalistic device of characterizing the local taxes as expenses of sale. *United States v. Buffalo Savings Bank*, 83 Sup. Ct. 314 (1963) (per curiam).

Section 6321 of the Internal Revenue Code provides that if, after demand, any person liable to pay any tax neglects or refuses to pay it, the amount of the tax will be a lien in favor of the United States on "all property and rights to property . . . belonging to such person."[2] Although section 6321 says nothing about the priority of its lien, and it was assumed at one time that it had no special rank,[3] the Supreme Court, in *United States v. Security Trust and Savings Bank*,[4] agreed that the tax lien statute was analogous to section 3466 of the Revised Statutes,[5] which had served to give to federal claims, in cases of insolvency, positions ahead of even antedating non-federal liens.[6] From that time forward, the section 6321 lien, like the section 3466 priority, was almost invariably said to be superior to a prior, competing non-federal claim on the ground that the latter was inchoate according to nearly impossible federal standards of perfection.[7] Recently, however, in *Aquilino v. United States*,[8] a reversal of the New York Court of Appeals,[9] the Supreme Court moved on a tack which suggested that, in the mechanic's lien cases at least, it was dissatisfied with the result of the inchoate lien doctrine. In the *Aquilino* case, the federal tax lien had attached to an amount which was owed to a taxpayer-contractor by the owner for whom he had done work. Subcontractors contended that, under state law,[10] the amount claimed constituted a direct trust for their benefit and that the contractor had, at best, only a beneficial interest in any surplus after their claims had been satisfied. The Court adopted what has been called an "operational" approach,[11] based on what the taxpayer actually could and could not do with regard to the property right in question, and concluded that it would be proper for the New York court, on remand, to hold that there was no property right in the

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[1]N.Y. CIV. PRAC. ACT § 1087 (1944).

[2]INT. REV. CODE OF 1954, § 6321.

[3]See Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905, 924 (1954).

[4]340 U.S. 47 (1950).

[5]REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1946).

[6]*E.g.*, United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).

[7]*E.g.*, United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215 (1955).

[8]363 U.S. 509 (1960).

[9]Aquilino v. United States, 3 N.Y.2d 511, 146 N.E.2d 774 (1957).

[10]N.Y. Sess. Laws 1942, ch. 808, § 36-a.

[11]See 46 IOWA L. REV. 666, 669 (1961).

taxpayer[12] to which the federal lien could attach. The bizarre result of having called a lien a trust was that an antedating federal lien was subordinated to a subsequent non-federal claim. *United States v. Brosnan*,[13] decided one week prior to *Aquilino* and relied upon heavily by the New York court in the instant case, also found the Supreme Court in retreat from the doctrine of absolute federal superiority which flourished around the tax lien statute. This time, the Court chose to allow state divestiture procedure to extinguish the Government's lien without making the United States a party to the action. The question of priority was never raised, but the unanticipated acquiescence did help to raise the question, implicit here, whether the Court might not also retreat from its position in the leading case of *United States v. City of New Britain*,[14] which was closely analogous to the instant case.

In *City of New Britain* the Court was confronted with a state law which elevated local real-estate tax liens over all other liens, including a prior lien of the United States; the Court looked past the state-created priority and followed the time-honored principle, which has been so distorted by the inchoate lien doctrine,[15] "that a prior lien gives a prior claim."[16] Seen from this vantage ground, the decision of the state court in the instant case could not be upheld. But viewed from atop *Aquilino*, in the light of the previous mechanic's lien cases,[17] the New York court was not sure; the line between the "priority" and the "property" approaches had been so thinly drawn that it was almost indistinguishable.

That the Supreme Court chose to follow *City of New Britain*, however, was not unexpected, for the Government's competitor in the instant case was not a private lienor but another government, and the state statute, here an obviously procedural one, aided not one of its citizens but the state itself. Despite overtones of a supremacy conflict, the question was entirely one of acquiescence, and clearly this was not a sort of subordination which the Court was willing to accept. It is suggested, however, that an operational interpretation of the federal tax lien statute may be adopted whenever the Court decides, as a matter of policy, that the federal interest should be subordinated to a non-federal lien.

Sam Dove Knowlton II

Federal Tort Claims Act—Liability Under the Act for Injuries Suffered by Federal Prisioners

In two separate actions, prisoners in federal penitentiaries filed claims under the Federal Tort Claims Act[1] for injuries allegedly sustained during incarceration as a result of negligence by federal employees. The United States District Court dismissed the actions. The

[12]See 47 Cornell L.Q. 308, 318 (1962).

[13]363 U.S. 237 (1960).

[14]347 U.S. 81 (1954).

[15]See Kennedy, *supra* note 3, at 924-25.

[16]Rankin v. Scott, 25 U.S. (12 Wheat.) 177, 178 (1827).

[17]*E.g.*, United States v. Colotta, 224 Miss. 23, 74 So. 2d 474, *rev'd per curiam* 350 U.S. 808 (1955).

[1]Prosser, Torts § 109 (2d ed. 1955).

Court of Appeals for the Second Circuit reversed, and certiorari was granted. HELD: Affirmed. Suits brought by federal prisoners under the Federal Tort Claims Act may be maintained to recover for personal injuries sustained during confinement in prison by reason of the negligence of government employees. *United States v. Muniz*, 83 Sup. Ct. 1850 (1963).

Prisoners traditionally have been able to sue their jailers for negligent acts resulting in injury to them, but the sovereign immunity doctrine has long shielded federal and state governments from suits for torts of their employees or agents, except where the government has given its assent to be sued.[2] The Federal Tort Claims Act[3] goes far in waiving the federal government's sovereign immunity. The act authorizes claims in the district courts for injuries caused by the negligent acts or omissions of federal employees within the scope of their employment under circumstances where the United States, if a private person, would be liable under local law.[4] In such actions the statute provides that the government . . . "shall be liable in the same manner and to the same extent as a private individual under like circumstances. . . ."[5] The broad statutory waiver of immunity is restricted by thirteen express exceptions.[6] Early commentators inferred from this specification of exceptions by Congress that it had intended all other claims to be cognizable under the act.[7] In the leading case of *Feres v. United States*,[8] however, the Supreme Court held that the Government was not liable to members of the armed forces for injuries arising in the course of military duty even though this was not one of the specified exceptions. Among the grounds for denying recovery was the fact that the United States could only be liable "in the same manner and to the same extent as a private individual under like circumstances"[9] and no private individual could ever be held liable "in like circumstances"[10] because no individual has the power to recruit and maintain an army with such authority over individuals as the government vests in its command. In reliance on the *Feres* case, a district court held in *Sigmon v. United States*[11] that suits by federal prisoners for alleged negligence of government employees would not be allowed, a decision which was followed by the Courts of Appeals for the Seventh[12] and Eighth[13] circuits. These

[2]28 U.S.C. §§ 1346(b), 2671-80 (1958).

[3]28 U.S.C. § 1346(b) (1958).

[4]28 U.S.C. § 2674 (1958).

[5]28 U.S.C. § 2680 (1958).

[6]See Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 53 (1946).

[7]340 U.S. 135 (1950).

[8]*Id.* at 141.

[9]*Ibid.*

[10]110 F. Supp. 906 (W.D. Va. 1953).

[11]Jones v. United States, 249 F.2d 864 (7th Cir. 1957).

[12]Lack v. United States, 262 F.2d 167 (8th Cir. 1958).

[13]350 U.S. 61 (1955).

courts have disallowed prisoner claims by stating that the prison system, like the military, is "distinctively federal" and requires uniformity. They found further similarity in the fact that private persons do not operate prisons just as they do not maintain armies, so they would not be "under like circumstances."

Although the *Feres* opinion appeared to provide far-reaching implications for the administration of the Federal Tort Claims Act, more recent cases indicate that the court may have abandoned several of the grounds for the decision. Two significant Supreme Court decisions seem to limit the "like circumstances" requirement as applied by the *Feres* case. In *Indian Towing Co. v. United States*[14] and *Rayonier Inc. v. United States*[15] the Supreme Court showed a tendency to interpret the act liberally. The Court held in both cases that the phrase "like circumstances" merely requires that governmental liability for negligence be determined in accordance with the general, private tort law principles.[16] In these two cases recovery was allowed for negligence of federal employees engaged in federal firefighting and light-house work. Although it is difficult to assess the effect of these later cases upon *Feres*, authorities agree that its announced rationale has been severely limited. *Feres* has not been overruled, but in light of later cases that decision now appears to rest upon the peculiar relationship between members of the armed forces and the adverse disciplinary effect that would result from liability under the act.

The Court in the instant case based its decision primarily upon a literal interpretation of the Federal Tort Claims Act. The decision seems to be in accord with the plain meaning of the act and with the liberal construction given the act in the *Indian Towing Co.* and *Rayonier* cases. The present case points out that the *Feres* decision is not applicable to the federal prisoner situation. Congress could have provided for a uniform federal law in enacting the Federal Tort Claims Act, but it chose to enact that the law of the place where the injury occurred should govern. The argument that the policy of Congress has been to treat all federal prisoners alike is not controlling. The Federal Tort Claims Act, in selecting state law as the rule of decision, makes many federal activities dependent on state law. Congress, when it was considering the act, would most likely have provided an express exception for federal prisoners if it had envisioned a very great disruption in its policy of uniform treatment. It can hardly be said that Congress has provided a uniform system of rights for federal prisoners when so few of them are covered by any system of compensation for injuries or death to them while they are in prison. The present decision seems just. The Court seems to be saying that since Congress did not except an act from coverage then neither should the courts.

Roger M. Flynt, Jr.

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[14]352 U.S. 315 (1957).

[15]See Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955).

[16]See Woody, *Recovery by Federal Prisoners Under the Federal Tort Claims Act*, 36 WASH. L. REV. 338, 356 (1961).

INTERNATIONAL LAW—JEWISH PERSONS DOMICILED IN HUNGARY AND INVOLUNTARILY DETAINED DURING WAR NOT DOMICILED WITHIN MEANING OF EXECUTIVE ORDER 8389

Jewish plaintiffs, formerly domiciled in Hungary, bringing suit pursuant to 22 U.S.C. Section 1631f(a) for the return of property vested in the Attorney General under the International Claims Settlement Act, as amended in 1955 to deal with Bulgaria, Hungary, and Rumania,[1] had a firm and continuing intent to leave Hungary forever, before and after the date of an executive order which froze their property in the United States and defined "national," but were kept in Hungary involuntarily through the loss of their civil and voting rights, of their home and business property, and through the imprisonment of the head of the family. The Attorney General moved to dismiss the complaint for lack of jurisdiction on the ground that the plaintiffs were "nationals" of Hungary, as defined in Executive Order 8389,[2] and were thus excluded under the terms of 22 U.S.C. Section 1631f(a) from eligibility to maintain the action. Executive Order 8389 defines "nationals" to include "any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time . . . since the effective date of this Order. . . ." HELD: Motion Denied. Plaintiffs were neither domiciled in, nor subjects, citizens or residents of Hungary for purposes of a suit under 22 U.S.C. Section 1631f(a), and were entitled to bring this suit. *Roboz v. Kennedy,* 219 F. Supp. 892 (D.C. 1963).

The economic prosecution of war during World War I was implemented by the enactment of the Trading with the Enemy Act.[3] One of the purposes of the act was to freeze in the United States assets which the enemy might own or control.[4] Executive Order 8389, as amended, supplemented the Trading with the Enemy Act by freezing assets in the economic prosecution of World War II. Congress, during post-war periods, provided remedies by which readjustment might be made for various property rights disrupted by the wars. Sections 2(a)[5] and 9(a)[6] of the Trading with the Enemy Act defined persons eligible to bring suit for recovery of seized property after World War I. Section 9(a) authorized a suit to be brought by "any person, not an enemy, or ally of an enemy. . . ." Section 2(a) defined an enemy as one who was *resident* within a designated territory. After World War II Section 32,[7] as amended, of the Trading with the Enemy Act authorized administrative return of vested property or the net proceeds thereof under certain conditions; but prevented return to an individual who was at any time after December 7, 1941, a citizen or subject of, *inter alia,* Hungary and who was present in the territory of such nation, *unless* by any decree of the nation the individual had not enjoyed full rights of citizenship because of his religious group. Section 33,[8] as amended, of the Trading

[1] 69 Stat. 562 (1955), 22 U.S.C. § 1631 (1958).

[2] 6 Fed. Reg. 2897, 2898 (1941).

[3] 40 Stat. 411 (1917) as amended, 50 U.S.C. APP. § 1-40 (1958).

[4] See Bishop, *Judicial Construction of the Trading with the Enemy Act,* 62 HARV. L. REV. 721 (1949); Lourie, *The Trading with the Enemy Act,* 42 MICH. L. REV. 205 (1943).

[5] 40 Stat. 411 (1917) as amended, 50 U.S.C. APP. § 2 (1958).

[6] 40 Stat. 419 (1917) as amended, 50 U.S.C. APP. § 9 (1958).

[7] 60 Stat. 50 (1946) as amended, 50 U.S.C. APP. § 32(a)(2)(D) (1958).

with the Enemy Act provided for the time of filing of such suit. Congress later, declaring an intent that the enemy should not recover their property at the end of World War II,[9] restricted the recovery of seized property by Section 39[10] of the Trading with the Enemy Act, precluding "nationals" of Germany and Japan from recovery. Section 39 did not repeal or otherwise affect Section 32. The International Claims Settlement Act, as amended in 1955 to deal with Bulgaria, Hungary, and Rumania, 22 U.S.C. Section 1631f(a), restricted the class of persons eligible to bring suit for recovery of seized property to persons other than a "national" as defined in Executive Order 8389, as amended. Executive Order 8389 defines the word "national" to include: "any person who has been *domiciled in,* or a subject, citizen or resident of a foreign country at any time . . . since the effective date of the Order. . . ." (Emphasis added.) Domicile as a legal concept determines the law which will affect one's personal rights and property. One receives a domicile at birth,[11] and has but a single domicile,[12] except where there is a conflict between courts.[13] Domicile may be changed by choice,[14] but until one does so the former domicile is retained.[15] To establish a domicile of choice, there must be the intent to make it one's home[16] and physical presence at the domicile of choice at the time the intent is in one's mind.[17]

After World War I, it was held that a German subject residing in the United States but visiting in Germany before the war, who was compelled to remain in Germany during the war, did not lose his residence in the United States and was, therefore, eligible to bring suit for recovery of seized property, within the limitations of Sections 2(a) and 9(a) of the Trading with the Enemy Act.[18] After World War II the Court, in *Guessefeldt v. McGrath,*[19] construed Sections 39 and 9(a) of the Trading with the Enemy Act together, determined that section 39 applied only to those nationals ineligible to bring suit under section 9(a), viewed "resident within" an enemy territory as implying something more than mere physical presence and something less than domicile and permitted a German national to bring suit. In another case the court construed "citizen" to be one who has the right to exercise all the political and civil privileges extended by a government and viewed "resident within the territory" as "indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties."[20] Thus, prior to the noted case, the

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[8]60 Stat. 925 (1946) as amended, 50 U.S.C. App. § 33 (1948).

[9]H. R. Rep. No. 976, 80th Cong., 1st Sess. 2 (1947).

[10]62 Stat. 1240, 1246 (1948), 50 U.S.C. App. § 39 (Supp. IV, 1958).

[11]Udny v. Udny, L.R. 1 H.L. (Sc.) 446 (1869).

[12]Goodrich, Conflict of Laws § 17 (1949).

[13]Restatement, Conflict of Laws § 11, comment *a* (1948).

[14]Succession of Steers, 47 La. Ann. 1551, 18 So. 503 (1895).

[15]Ayer v. Weeks, 65 N.H. 248, 18 Atl. 1108 (1889).

[16]*E.g.,* McDonald v. Hartford Trust Co., 104 Conn. 169, 132 Atl. 902 (1926).

[17]*E.g.,* White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).

[18]Stadtmuller v. Miller, 11 F.2d 732 (2d Cir. 1926).

[19]342 U.S. 308 (1952) (C. Vinson, J., dissenting).

[20]Kaku Nagona v. McGrath, 187 F.2d 759 (7th Cir. 1951); *aff'd per curiam,* McGrath v. Kaku Nagona, 342 U.S. 916 (1952).

material elements "citizens" (which may be equated with "subject"), and "resident" had been judicially construed. The judicial trend of liberal construction favoring recovery[21] could be expected to have its effect upon the court in its consideration of the noted case.

The dissenting opinion of Justice Vinson in the *Guessefeldt*[22] case suggests that Congress did not intend the construction of "national" as given by the Supreme Court, and that Section 39 of the Trading with the Enemy Act should be literally read since the definition of "national" in Executive Order 8389 had been given a legislative definition.[23] When Congress subsequently adopted in 22 U.S.C. Section 1631f(a) the same definition of "national," that it used to broadly define classes of persons whose property might be seized, to similarly restrict the eligibility to bring suit by excluding those persons whom the definition includes, it should have indicated to the courts that the intent of Congress was correctly expressed by Justice Vinson, at least as applied to the eligibility of future claimants under this section. The restrictive trend of Congress would indicate that domicile was intended to have its common law meaning, thus requiring physical removal from the country before this element of Executive Order 8389 could be disposed of. The court in the instant case, sitting in equity, in extinguishing domicile, was no doubt impressed with the trend in construction, the hardships and humiliations endured by plaintiff during the war, and must have noted that Congress had previously provided a remedy for plaintiff in Section 32 of the Trading with the Enemy Act, and that such relief was barred only by the Statute of Limitations.[24] Since recovery involves fiscal aspects as well as international policy, and hardship is but the toll of war, the rights and remedies of unfortunate nationals of an enemy country should be a matter for the grace of Congress.[25] It is submitted that the decision of the court in the noted case did not extend the common law concept of domicile, that the court's construction of 22 U.S.C. Section 1631f(a) was contrary to the intent of Congress, but that the court was blessed with an innate sense of justice toward this class of claimants to which Congress has not yet extended its grace.

William M. Dye, Jr.

JOINT ADVENTURES—SHARING OF LOSSES

This was a case concerning the sharing of losses by three joint adventurers in a honey dew melon, marketing venture. Adventurers agreed to share the profits according to the amount of melons shipped by each party, but no agreement as to the sharing of losses was made, and the chancery court entered a decree prorating the losses equally among the adventurers. HELD: Affirmed. In the absence of a loss-sharing agreement between the joint adventurers, the losses are to be

[21]Guessefeldt v. McGrath, 342 U.S. 308, 319 (1952) (C. Vinson, J., dissenting).

[22]Guessefeldt v. McGrath, 342 U.S. 308 (1952) (C. Vinson, J., dissenting).

[23]50 U.S.C. APP. § 617, ratifying Executive Order 8389, § 5(e)(i), 6 Fed. Reg. 2897, 12 U.S.C.A. § 95a note.

[24]See Legerlotz v. Rogers, 266 F.2d 457 (D.C. Cir. 1959), *petition for cert. dismissed*, 362 U.S. 938 (1960). See generally Comment, 62 YALE L.J. 1210, 1232-33 (1953).

[25]Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920).

shared equally, notwithstanding the profit-sharing agreement or whether one grew most of the melons used. *Hughes v. Bond,* 154 So. 2d 281 (Miss. 1963).

A joint adventure is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.[1] Joint adventures are similar to partnerships but are different in that joint adventures relate to single transactions or ventures, while partnerships set up lasting relationships which result in continuing business.[2] Joint adventures have been used in many different types of ventures such as the purchase of mineral rights,[3] and establishing a garment factory,[4] as well as agricultural ventures as in the instant case. The joint adventure agreement need not be expressed or embodied in a formal agreement; it may be inferred from the conduct of the parties and the facts and surrounding circumstances.[5] It has been held that the expectation of making a profit is an indispensable part of a joint adventure,[6] which presupposes that the parties must likewise bear the burden of an injury or loss.[7] An agreement, express or implied, for the sharing of profits is essential, but there need be no specific agreement for sharing the losses.[8]

It has generally been held that, in the absence of an agreement as to the sharing of losses in a joint adventure, the law will supply the provision that the losses are to be shared by the parties in the same proportion as profits.[9] This is the general rule and there is no dissent from it in either the textbook authorities,[10] or the encyclopedias.[11] In a Mississippi case in the Court of Appeals for the Fifth Circuit where there was an agreement to divide the profits on an unequal basis, it was held that the losses were to be shared equally according to the agreement by the parties notwithstanding the proportions of the profit distribution.[12]

In its opinion in the instant case, the court cited *Boxwell v. Champagne,*[13] and *Sample v. Romaine*[14] as authority along with *American Jurisprudence.*[15] The cited cases are indicative of the general law applicable to joint adventures and do not directly support the court's opinion on the rule of loss-sharing by joint adventurers. The encyclopedia

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[1]*E.g.,* Boxwell v. Champagne, 229 Miss. 355, 91 So. 2d 256 (1956).

[2]*E.g.,* Ford v. Commercial Securities Co., Inc., 220 Miss. 157, 70 So. 2d 525, *motion overruled in part and sustained in part,* 220 Miss. 157, 75 So. 2d 203 (1954).

[3]Woodruff v. Bates, 210 Miss. 894, 50 So. 2d 559 (1951).

[4]Mechanics State Bank v. Tuf-Nut Garment Mfg. Co., 185 Miss. 589, 188 So. 278 (1939).

[5]Sample v. Romaine, 193 Miss. 707, 8 So. 2d 257 (1942).

[6]*E.g.,* Sappenfield v. Mead, 338 Ill. App. 236, 87 N.E.2d 220 (1949).

[7]Martter v. Byers, 75 Cal. App. 2d 375, 171 P.2d 101 (1946).

[8]*E.g.,* Sample v. Romaine, 193 Miss. 707 8 So. 2d 257 (1942).

[9]Parker v. Trefry, 58 Cal. App. 2d 69, 136 P.2d 55 (1943).

[10]2 Williston On Contracts § 3184 (Jaeger, 3d ed. 1959).

[11]48 C.J.S. *Joint Adventures* § 11 (1947).

[12]Trinidad Asphalt Mfg. Co. v. Gregory, 166 F.2d 745 (5th Cir. 1948).

[13]229 Miss. 355, 91 So. 2d 256 (1956).

[14]193 Miss. 707, 8 So. 2d 257 (1942).

[15]30 Am. Jur. *Joint Adventures* § 45 (1958).

reference is to the statement of the general rule on loss-sharing as stated above. Therefore, it would seem that the authorities mentioned above do not support the proposition for which they were cited. It would further seem that the court has established itself as the sole adherent to a new minority rule.

Charles B. Bratt

OIL AND GAS—IMPLIED COVENANTS—LIMITATIONS OF THE MILLETTE RULE

Defendant oil company, lessee of the complainant's land as well as the adjoining land, completed a producing oil well in the fall of 1959 as a direct north offset to the complainant's property. The complainant in February 1960 requested that a well be drilled on his property. In May 1960 the complainant's land and adjoining tracts, also leased by defendant, were subleased and a dry hole was drilled as a west offset to the complainant's land. In a suit to recover damages for drainage, the value of the recoverable oil beneath complainant's land was found to be $70,000, while the cost of completing a well would be between $100,000 and $150,000. The lower court awarded the complainant the value of his interest in the oil drained by the defendant's well. HELD: Reversed. In the absence of bad faith, a lessee is not liable for drainage if a prudent operator would not have drilled, even though defendant, rather than a third party, is responsible for the drainage as the lessee of the adjoining property. *Monsanto v. Andreae*, 147 So. 2d 116 (Miss. 1962).

Defendant oil company, lessee of the complainant's property and adjoining property, drilled and dually completed an oil well as a south offset to the complainant's property in March 1959. Drilling operations were initiated on the complainant's lease the following month and resulted in a dry hole in July 1959. Subsequently, reworking operations were begun on the unsuccessful venture and continued until January 1961 when the well was again abandoned. The property was then subleased and a well drilled at an exceptional location was successfully completed from one of the horizons in October 1961. Prior to the completion, a west offset to the lease had been completed in June 1961 and in July 1961 an east offset was completed. In an action for breach of the drainage and development covenants, damages were awarded from the expiration of a reasonable time after the unsuccessful venture was first abandoned, the trial court finding that although defendant had acted in good faith, it had not acted as a prudent operator in the reworking attempts. HELD: Reversed, rendered in part, and remanded in part. The evidence did not support the finding that defendant was imprudent in the reworking attempts, and having acted in good faith defendants' liability, if any, could date only from the expiration of a reasonable time after the reworking operations ceased, regardless of the fact that the drainage resulted from defendants' own acts on adjoining tracts. *Monsanto v. Sykes*, 147 So. 2d 290 (Miss. 1962).

From the time when the doctrine of implied covenants was promulgated in 1889[1] controversy has raged as to the rights and duties under

[1]Malone, *Problems Created by Express Lease Clauses Affecting Implied Covenants*, 2 ROCKY MOUNTAIN MINERAL LAW INST. 133 (1956).

these covenants.[2] No small amount of the dispute has centered on the offset, or drainage, covenant.[3] The obligation of the lessee of land which has been offset is to drill or account for not drilling when two elements are shown: first, that there has been drainage from the land; and second, that an offset well would be profitable or that a prudent operator would drill.[4] One of the main points of dispute, and the one involved in the two noted cases, is whether the lessee of the property being drained is placed under a greater duty when he, rather than a third party, is responsible for the drainage by virtue of his acts on adjoining property. With few dissents,[5] authorities in the field would not impose a greater duty,[6] but the courts considering the problem have decided otherwise.[7] In *Phillips Petroleum Co. v. Millette*[8] even though there was an express offset covenant in the lease, the Mississippi court implied a new covenant based upon public policy to protect the lessor against drainage by acts of his lessee upon adjoining land. This covenant imposes upon the lessee a duty to protect the interest of the lessor against depletion of the lessor's land by the affirmative acts of the lessee upon adjoining property.[9] Liability is established by a showing of only one of the usual elements necessary to impose liability, *i.e.*, substantial drainage, even though a prudent operator would not have drilled.[10] Supporting the *Millette* rule and the theory of a greater duty are decisions in California,[11] Kansas,[12] Kentucky,[13] Pennsylvania,[14] West Virginia,[15] and the federal courts of Illinois[16] and Louisiana.[17] A recent federal decision in Wyoming has squarely adopted the theory of a

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[2]See generally MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES (2d ed. 1940).

[3]*Id.* § 93-117.

[4]Meyers, *Two Drilling Covenants Implied in Oil and Gas Leases*, 38 MINN. L. REV. 127, 129 (1954).

[5]See generally Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A.L. REV. 508 (1956).

[6]See generally MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 111 (2d ed. 1940).

[7]*E.g.*, Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1954).

[8]221 Miss. 1, 72 So. 2d 176, 74 So. 2d 731 (1954).

[9]Millette v. Phillips Petroleum Co., 209 Miss. 687, 703-704, 48 So. 2d 344, 346 (1950).

[10]Phillips Petroleum Co. v. Millette, 221 Miss. 1, 13-15, 72 So. 2d 176, 177-179 (1954).

[11]Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App. 2d 246, 158 P.2d 754 (Dist. Ct. App. 1954).

[12]See Culbertson v. Iola Portland Cement Co., 87 Kan. 529, 125 Pac. 81 (1912).

[13]See Hughes v. Busseyville, 180 Ky. 545, 203 S.W. 515 (1918).

[14]See Kleppner v. Lemon, 197 Pa. 430, 47 Atl. 353 (1900).

[15]See Adkins v. Huntington, 113 W. Va. 490, 168 S.E. 366 (1933).

[16]Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940).

[17]See Billeaud Planters v. Union Oil Co., 245 F.2d 14 (5th Cir. 1957).

greater duty.[18] Courts apparently refusing to impose the increased duty are those of Oklahoma,[19] Texas,[20] Illinois,[21] and Arkansas.[22]

It has been suggested that the *Millette* rule made the lessee liable for *any* drainage caused by his own affirmative acts.[23] However, through the two principal cases the application of the rule has been limited. In the *Andreae* case, the court explicitly states that the prudent operator test is still applicable except in a situation analogous to the *Millette* case.[24] It is further pointed out that in the *Andreae* case there is no evidence of bad faith on the defendant's part,[25] apparently suggesting that the lessee in the *Millette* decision acted in bad faith. This is substantiated in the *Sykes* case where, in distinguishing *Millette,* the court states: "In Millette the lessee did not spend any money in an effort to develop Millette's land and affirmatively prevented Millette from doing so himself or having others develop his land."[26] The only clear meaning to be drawn is that now, in order to subject the lessee to the *Millette* rule, it must be shown that the lessee acted in bad faith. The net effect of the rule as now limited leaves to the lessor two major benefits. First, he has protection against drainage even though an offset covenant is expressed, if he can show that the lessee has acted in bad faith. Second, if bad faith is shown, then the lessor need only show the element of drainage, and not the combination of drainage plus proof that a prudent operator would drill. A similar result is reached in other jurisdictions where it is held that if the lessee acts in bad faith then he is estopped to deny that a prudent operator would have drilled.[27]

With the decisions in the *Andreae* and *Sykes* cases the court has obviously distinguished the *Millette* case on the grounds of bad faith, and now makes bad faith a requirement for recovery under the rule of that case. However, it remains unclear whether recovery will be allowed under the *Millette* rule if the recoverable reserves are small and any well drilled would result in an economic loss. There is language in the two cases to suggest that the court is willing to limit recovery, not only to the situation of bad faith, but also to the particular economic situation found in the *Millette* case. There the recoverable reserves were such that, considering only drilling and completion cost, the lessee would have realized a profit after the payment of royalty. It is believed that since the court refused to overrule the *Millette* case it should be so

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[18]Olsen v. Sinclair Oil & Gas Co., 212 F. Supp. 332 (D. Wyo. 1963).

[19]See Boswood Oil & Gas Co. v. Mary Oil & Gas Co., 146 Okla. 211, 23 P.2d 387 (1933); Gerson v. Anderson-Prichard Prod. Co., 149 F.2d 444 (10th Cir. 1945).

[20]See Hutchins v. Humble Oil & Ref. Co., 161 S.W.2d 571 (Tex. Civ. App. 1942); Tidewater Associated Oil Co. v. Scott, 159 F.2d 174 (5th Cir. 1946), *cert. denied,* 331 U.S. 817 (1947).

[21]See Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (1950).

[22]See Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921).

[23]Krieg, *Lease Terminations for Breach of the Implied Obligation of the Lessee,* 3 ROCKY MOUNTAIN MINERAL LAW INST. 697, 721 (1957).

[24]Monsanto Chem. Co. v. Andreae, 147 So. 2d 116, 118 (Miss. 1962).

[25]*Ibid.*

[26]Monsanto Chem. Co. v. Sykes, 147 So. 2d 290, 297 (Miss. 1962).

[27]*E.g.,* Adkins v. Huntington, 144 W. Va. 490, 168 S.E. 366 (1933).

limited to the economic situation therein. It would appear that any extension beyond this point would amount to speculation on the part of the court.

Richard D. Foxworth

SALES—IMPLIED WARRANTY—ABSOLUTE LIABILITY IMPOSED ON MANUFACTURER WHOSE CIGARETTES CAUSED LUNG CANCER

Decedent had smoked from one to three packages of cigarettes manufactured by the defendant each day[1] from 1924 or 1925 until February 1, 1956, when he learned that he had lung cancer. Prior to his death on February 25, 1958, he began this action against the manufacturer on the claim that he had incurred lung cancer as a result of smoking cigarettes made by the defendant. The trial of the cause resulted in a general jury verdict for the defendant. HELD: Reversed. There is imposed upon the manufacturer and the distributor of cigarettes absolute liability for breach of implied warranty of fitness where the cigarettes caused fatal lung cancer in the consumer, even though prior to the time he had contracted the cancer reasonable application of human skill and foresight could not have made known to the manufacturer and distributor that the consumer would be in danger of contracting cancer of the lung. *Green v. American Tobacco Co.*, 164 So. 2d 169 (Fla. 1963).

The medieval doctrine of *caveat emptor* threw the purchaser upon his own resources whenever he bought goods, because no warranty of the goods' quality could be implied from the fact of the sale alone.[2] The early courts first provided such a remedy when they expanded the action of trespass on the case, distinctively an action sounding in tort, to include deceit.[3] The expansion of this action was based on the implication of a representation of quality upon which the purchaser was deemed to have relied.[4] It was not until 1778 that the English courts employed the action of *indebitatus assumpsit* to provide an aggrieved purchaser a remedy by way of warranty.[5] The remedy in assumpsit was predicated upon the existing contractual relation between the purchaser and the seller and the seller's failure to fulfill his promise of warranty.[6] Implied warranties of quality were first recognized in 1810, and they were assumed to be actionable in assumpsit.[7] This historical evolution of the doctrine of implied warranty rendered it a unique composite of both tort and contract theory. The courts in some instances continue to require privity between the parties litigant when there is an alleged breach of implied warranty *ex contractu*,[8] but privity is no longer re-

[1]Green v. American Tobacco Co., 304 F.2d 70, 72 (5th Cir. 1962).

[2]BENJAMIN, SALES 664 (Finnemore & James ed. 1950).

[3]See FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03 [1] (1963).

[4]63 COLUM. L. REV. 773 (1963).

[5]1 WILLISTON, SALES § 195 (rev. ed. 1948).

[6]See Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 149 (1937).

[7]See Holcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (N.P. 1810).

[8]See Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 26 RUTGERS L. REV. 493, 494-500 (1962).

quired where negligence is alleged to be the basis of the manufacturer's liability.[9] Section 2-318 of the Uniform Commercial Code gives the buyer's family and guests the benefit of the same warranty which the buyer received in the contract of sale so that they are likewise freed from the technicalities of privity; but the Code explicitly assumes a neutral position as to the seller's liability to a sub-purchaser. Mississippi recognizes a warranty of wholesomeness with regard to food or beverages which runs in favor of the ultimate consumer so that privity has been eliminated in these cases.[10] Even as a contractual concept, however, implied warranties are created by the law as it operates upon the circumstances of the sale so that the intent of the parties is perfectly irrelevant to the creation of the implied warranties.[11] There can be implied warranties both of fitness for a particular purpose and of merchantability. The law imposes a warranty of fitness for a particular purpose when the buyer informs the seller either expressly or impliedly of a particular purpose for which he buys the goods so that he relies on the seller's skill or knowledge.[12] An implied warranty of merchantability means that the object sold is reasonably suitable for the ordinary purposes for which it is manufactured and sold.[13] The two may frequently coincide, as in the case of food products, should the particular purpose for which a product is used also be one of the ordinary uses of that product.[14]

The court in the instant case imposed strict liability on the manufacturer of cigarettes under the doctrine of implied warranty, based on the seller's undertaking or agreement, which was created by law, to be responsible in the event that the article sold was not in fact merchantable. The court expressly stated that the implied warranty of harmlessness was not limited by the tort doctrine of foreseeability. As the test for the wholesomeness of a product, the court adopted the standard of the product's actual safety for human consumption as determined by objective truth, and it rejected the prevailing industrial standards as an accurate test. The court concluded that failure to adopt the "actual safety for consumption" test would shift to the purchaser all the risk of latent defects or unwholesomeness which might ultimately be proved by continuously advancing human knowledge and experience. It was the court's opinion that from its earliest inception into the law, the objective of the implied warranty doctrine had been to attach that risk to the mercantile function. Here, it must be noted that although an implied warranty has been extended to cover latent defects in Mississippi,[15] the precise question presented in the instant case has yet to be decided in this jurisdiction. The court in this case did not consider the problems of proving by a preponderance of the evidence that cigarettes are in fact the proximate cause of cancer even though it would

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[9]*E.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[10]*E.g.*, Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

[11]J. A. Campbell Co. v. Corley, 140 Ore. 462, 13 P.2d 610, 614 (1932).

[12]The S. S. Angelo Toso, 271 Fed. 245 (3d Cir. 1921).

[13]Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 76 (1960).

[14]See Stonebrink v. Highland Motors, Inc., 170 Ore. 415, 137 P.2d 986 (1943).

[15]Missouri Bag. Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

seem that this is the toughest problem which the plaintiff must overcome if he is to succeed.

The historicaly developed bifurcation of the concept of absolute liability has created a perplexing legal labyrinth of privity, merchantability and foreseeability, through which the wronged purchaser, particularly of products intended for human consumption, must warily, if not craftily, proceed, if he hopes to establish the liability of a manufacturer or dealer whose product injures him. As an alternative to the warranty concept, a California court this year held the manufacturer of a power tool strictly liable in tort for the injury caused the plaintiff by the use of the tool.[16] Section 402A of the *Restatement of Torts (Second)* provides strict liability in tort in the case of all sellers of food and all other products intended for "intimate bodily use," regardless of nutritive value. This section would therefore include commodities such as chewing gum, chewing tobacco, snuff, and cigarettes.[17] If it is true that the objective of the implied warranty doctrine is to attach the risk of a product's latent defects or unwholesomeness to its manufacturer, it is submitted that section 402A is indeed a more realistic and effective means of accomplishing this objective than is the implied warranty doctrine.

Thomas Allen Coleman

Tax Accounting—Deferment of Prepaid Income

The taxpayers were partners in a franchise agreement to operate a series of ballroom dancing studios. Dancing lessons were offered under either a cash plan contract in which the student paid the entire down payment in cash when the contract was executed and the balance due in installments, or a deferred payment contract which allowed the student to pay part of the down payment in cash and the remainder of the down payment in installments while the balance due under the contract was to be paid as designated in a negotiable note. The cash from advance payments and the amounts received when the notes were discounted were deposited in the studio's general account with no attempt to maintain any separation from other funds. The studio kept its books and reported income for tax purposes using the accrual method of accounting. It was the policy of the studio to cancel a contract when there had been no activity with regard to it for over a year and to recognize a gain to the extent of the advance payments received. Deductions were reported on the accrual basis except for royalty payments on the franchise agreements and sales commissions on the contracts, which were deducted when paid regardless of when the related receipts were taken in as income. The Commissioner, in rejecting the studio's accounting system as not clearly reflecting income, included in gross income the advance payments received in cash and the full face amounts of the notes and the contracts executed in the years in question. The Tax Court and the Court of Appeals upheld the Commissioner. In the Supreme Court, the Commissioner conceded that

[16]Greenman v. Yuba Power Prods., Inc., 59 Cal. App. 2d 67, 377 P.2d 897 (1963).

[17]1 Frumer & Friedman, Products Liability § 16.03 [2] n.10.3 (1963).

future payments, which were neither due by the terms of the contract nor matured by performance, should not be included in gross income. HELD: Affirmed in part, reversed as to the Commissioner's concession and remanded for a recomputation of the tax deficiency. The Commissioner properly exercised his discretionary power under Section 41, 1939 Code, Section 446(b), 1954 Code, in rejecting the studio's method of accounting as not clearly reflecting income and including in gross income all advance payments by way of cash, negotiable notes, and contract installments falling due but remaining unpaid in that year. *Schlude v. Comm'r.*, 83 Sup. Ct. 601 (1963).

The Code permits a taxpayer to compute taxable income under the method of accounting regularly used by him and lists "an accrual method" as one of the permissible methods.[1] All of the permissible methods listed by the Code are subject to the exception that if the method does not *clearly reflect income*, then the Commissioner may direct the method by which the taxable income will be computed.[2] Prepaid income has almost consistently been held taxable in the year of receipt if owned or claimed by the taxpayer without restriction as to its use, regardless of the accounting method used or the time when the receipts were actually earned.[3] This conflict between statute and case law was created by the misapplication of the "claim of right" doctrine which was applied originally to tax those earnings received without restriction as to disposition but subject to the contingency of being required to restore its equivalent.[4] Since then, the doctrine has been used as authority to tax the receipts of an accrual basis taxpayer even though those receipts had not yet been earned.[5] Although the noted decision is not based on this doctrine, the Court seems to use it as further support for its decision.[6] The resultant confusion in this area of the tax law caused Congress to enact legislation in 1953 which permitted the accrual basis taxpayer to defer the reporting of prepaid income until the year in which the income was earned but limited the period of deferment to five years.[7] The estimated loss of revenue from these new provisions caused their retroactive repeal in 1955. The legislative intent which has been the basis for subsequent, important Supreme Court decisions was discussed in the Senate and the House committee reports.[8] Included in the reports was the discussion of a case decided while these provisions were in effect allowing the deferment of income received from prepaid newspaper subscriptions.[9] The reports indicated that the Secretary of the Treasury would not consider the repeal of those sections as either acceptance or rejection by Congress of

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[1]INT. REV. CODE OF 1954, § 446.

[2]*Ibid.*

[3]Behren, *Prepaid Income—Accounting Concepts and the Tax Law*, 15 TAX L. REV. 343 (1960).

[4]North American Oil Consol. v. Burnet, 286 U.S. 417, 424 (1932).

[5]*E.g.*, South Dade Farms, Inc. v. Comm'r, 138 F.2d 818 (5th Cir. 1943).

[6]See Schlude v. Comm'r, 83 Sup. Ct. 601, 606 (1963).

[7]INT. REV. CODE OF 1954, ch. 143, § 452, 69 Stat. 134; INT. REV. CODE OF 1954, ch. 143, § 462, 69 Stat. 134.

[8]S. REP. No. 372, 84th Cong., 1st Sess. 5-6 (1955); H. R. REP. No. 394, 84th Cong., 1st Sess. 5 (1955).

[9]Beacon Publishing Co. v. Comm'r, 218 F.2d 697 (10th Cir. 1955).

that decision. It was stated in the dissenting opinion in one case[10] that the Congressional intent was clear—the trend of judicial decision which changed when sections 452 and 462 were enacted should be allowed to run its course without any inference of disapproval being drawn from the repeal of those sections. However, the prevailing view which is again expressed in the noted case is that "the cold fact . . . that [Congress] . . . repealed the only law incontestable permitting the practice upon which the [petitioner] . . . depends"[11] is a clear mandate from Congress that this system is not acceptable for tax purposes.[12] This view has been substantiated by Congressional refusal to allow the deferment practice except in two instances—one with regard to prepaid subscription income in 1958[13] and another with regard to certain membership corporations in 1961.[14]

The decision in the noted case turns on the determination that the method of accounting used does not clearly reflect income. The Court states that this case is "squarely controlled" by the decision in *American Auto. Ass'n v. United States.*[15] The legislative history aspect of that decision and its application to the noted case was discussed above. The *American Auto. Ass'n* case, relying on a previous decision,[16] rejected the taxpayer's accounting system as artificial since the advance payments related to services based on customer demand, with no fixed dates for future performance. The dancing lesson contracts in the noted case were subject to the same vice; they did not include a schedule of fixed dates for the lessons, but were scheduled from time to time as lessons were given. It must be noted, however, that an accurate determination of earnings on each student contract could be ascertained at the close of the taxable year by the use of individual student record cards which included the number of hours taught and the number of hours remaining to be taught under the contract. The Court also condemned the "arbitrariness" as to the time when gains from cancellation of contracts were to be recognized and indicated that some attempts to report estimated cancellations in the year of receipt should have been made.[17] The able dissenting opinion pointed out that such an estimate would have to rely on precisely the same type of statistical information which was struck down by the Court in the *American Auto. Ass'n* case as being impermissible for income deferment purposes.[18] These facts, together with the method of deducting royalties and sales commissions for lessons sold in the year when paid even though related items of income had been deferred to later periods, rendered the studio's accrual system vulnerable under section 41 and 446(b) with respect to its deferment of prepaid income.[19]

[10]American Auto. Ass'n v. United States, 367 U.S. 687, 706 (1961) (dissenting opinion).

[11]*Id.* at 695.

[12]Schlude v. Comm'r, 83 Sup. Ct. 601, 604-05 (1963) quoting American Auto. Ass'n v. United States, 367 U.S. 687, 695 (1961).

[13]INT. REV. CODE OF 1954, § 455.

[14]INT. REV. CODE OF 1954, § 456.

[15]367 U.S. 687 (1961).

[16]Automobile Club v. Comm'r, 353 U.S. 180 (1957).

[17]Schlude v. Comm'r, 83 Sup. Ct. 601, 605 n.9 (1963).

[18]*Id.* at 609 (dissenting opinion).

[19]*Id.* at 605-06.

This case again confirms the Commissioner's stand that present law does not require or permit the postponement of income, received in either cash or its equivalent, beyond the year of its receipt for the purpose of matching the related expenses incurred in performing the services due.[20] The noted case represents what could possibly be termed a new and extended misapplication of the claim of right doctrine since money is taxed that is neither *received nor earned.*[21] The dissenting opinion states that this case ". . . completes the mutilation of a basic element of the accrual method of reporting income. . . ."[22] it appears that those taxpayers who wish to compute taxable income under the accrual method must await legislative aid.

H. Wingfield Glover, Jr.

TORTS—IMPLIED WARRANTIES—NECESSITY OF AN ACCOMPANYING SALE

Plaintiff, the owner of a tugboat, had her chartered to defendant. Under the charter defendant was to supply all rope needed for lines and the like. Plaintiff reported that repairs were required on the vessel. So that plaintiff could make these repairs, defendant had the boat's stern hoisted with a brand new 1¼ inch manila line which he had furnished for that purpose. While plaintiff was working under the stern the boat fell on him as a result of this rope's breaking. At the trial the jury found the rope defective from a flaw of which the defendant could not have known. The district court rendered judgment against the defendant, holding that the defect breached his warranty of merchantable quality. HELD: Reversed. The usual warranties of a manufacturer, seller, or supplier of goods do not attach where material is supplied to the owner by a charterer under his charter contract. *Delta Eng'r Corp. v. Scott,* 322 F.2d 11 (5th Cir. 1963).

By far the more prevalent, and certainly the better, holdings of American courts at common law, with regard to the implied warranty of merchantable quality, are encompassed by the concise language of section 15(2) of the Uniform Sales Act. Unquestionably this doctrine still finds its largest application in the law of sales. Insistence upon a technical sale has led some courts to deny the implication of a warranty,[1] particularly in restaurant cases.[2] In getting away from the early law,[3] which held that innkeepers performed a service for their patrons and not a sale which would support an implied warranty, the great majority of courts find a sale under our modern restaurant practices.[4] Although a

[20]Oberdorfer and Michelman, *A Commentary on Tax Administration and Accrual Accounting,* 12 AM. U.L. REV. 135 (1963).

[21]Behren, *Schlude Holds Prepaid Income Taxable on "Receipt," Rationale is Uncertain,* 18 J. TAXATION 194, 199 (1963).

[22]Schlude v. Comm'r, 83 Sup. Ct. 601, 609 (1963) (dissenting opinion).

[1]*E.g.,* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954).

[2]*E.g.,* McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934).

[3]See Parker v. Flint, 12 Mod. 225, 88 Eng. Rep. 1303 (K.B. 1697); Crisp v. Pratt, Cro. Car. 549, 79 Eng. Rep. 1072 (K.B. 1635).

[4]*E.g.,* Arnaud's Restaurant, Inc. v. Cotter, 212 F.2d 883 (5th Cir. 1954).

few courts have taken the bold step and found an implied warranty without basing it on an accompanying sale,[5] they are the exception, and their decisions don't seem to have greatly fostered the implication of warranties in non-sale cases.[6] The courts seem to have been more liberal in implying warranties in the field of bailments.[7] The bailor for hire has been held to have warranted horses,[8] a tractor,[9] a crane,[10] a gasoline tank,[11] motion picture film,[12] and weed burner[13] among diverse other chattels. An implied warranty has even been extended to furnishings supplied under a short term lease of living quarters.[14] The warranty in these bailment cases would seem to come more under section 15(1) than 15(2) of the Uniform Sales Act, as the courts are more prone to speak in terms of "fitness for a particular purpose" than in terms of "merchantable quality." Even where the chattel is found to be unfit for its ordinary uses, and the bailor is in the business of supplying such chattels, the tendency of some courts is to talk in terms of whether it was fit for the particular purpose intended and not of whether it conformed to a standard of merchantable quality.[15] Possibly the court of appeals was thinking in terms of a bailment relation when they concluded that "there is nothing suggesting that [plaintiff] was relying upon any peculiar or special skill or knowledge on the part of [defendant],"[16] since such reliance is necessary to imply a warranty of particular purpose but not to imply one of merchantable quality.

Although Mississippi has never adopted the Uniform Sales Act or the Uniform Commercial Code the precedents of this state with regard to implied warranties in sales transactions are directly in line with the great majority of decisions of which these uniform acts are merely declaratory. In the straight sales cases, as opposed to those dealing with service of food or bailment, the Mississippi court's approach has been, uniformly, to look for the sale and, once finding it, proceed to imply the warranty of merchantable quality[17] or the warranty of particular purpose.[18] The court took a very progressive view of the service of food cases in *Sartin v. Blackwell*,[19] where they agreed with Mr. Williston that "even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater

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[5]*E.g.*, Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949).

[6]See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 662 (1957).

[7]See 4 WILLISTON, CONTRACTS § 1041, at 2907 (rev. ed. 1936).

[8]*E.g.*, Koser v. Hornback, 75 Idaho 24, 265 P.2d 988 (1954).

[9]McNeal V. Greenberg, 40 Cal. 2d 740, 255 P.2d 810 (1953).

[10]Price Boiler & Welding Co. v. Gordon, 138 F. Supp. 43 (E.D. Mich. 1956).

[11]Marcos v. Texas Co., 75 Ariz. 45, 251 P.2d 647 (1952).

[12]Famous Players Film Co. v. Salomon, 79 N.H. 120, 106 Atl. 282 (1918).

[13]Rohar v. Osborne, 133 Cal. App. 2d 345, 284 P.2d 125 (1955).

[14]Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

[15]See, *e.g.*, McNeal v. Greenberg, 40 Cal. 2d 740, 255 P.2d 810 (1953).

[16]Delta Eng'r Corp. v. Scott, 322 F.2d 11, 18 (5th Cir. 1963).

[17]*E.g.*, D. Rosenbaum's Sons v. Davis & Andrews Co., 111 Miss. 278, 71 So. 388 (1916).

[18]*E.g.*, Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[19]200 Miss. 579, 28 So. 2d 222 (1946).

force to the serving of food to a guest or customer at an inn or restaurant."[20] In a number of cases dealing with persons injured from drinking a bottled beverage the Mississippi court has held that the bottler of a beverage impliedly warrants that the beverage bottled and distributed by it is wholesome and fit for human consumption,[21] *i.e.*, that the beverage is of merchantable quality. This has been held to be so even though the injured party obtained the beverage from a middleman[22] or as a gift from a friend.[23] The rule now is that the implied warranty inures to the benefit of the ultimate consumer.[24] There seem to be no cases in which the Mississippi court has specifically charged the bailor of a chattel with the implied warranty of merchantable quality or that of particular purpose.

From the foregoing discussion it can be seen that there is respectable authority for expanding the doctrine of implied warranties beyond cases involving sales. However, this authority is mainly confined to cases involving bailment contracts or contracts for services. The decisions, as a whole, indicate that the better rule requires a sale, and in its absence, a warranty may be implied on other contractual bases only where justice cannot otherwise be accomplished. It would not seem that the court of appeals was in disagreement with this conclusion in finding that there was no implied warranty running from defendant to plaintiff in regard to the quality of the rope used in the principal case. It appears that their acceptance of the fact that there was no sale, as such, of the rope by defendant to plaintiff, would indicate their willingness to affirm the lower court's finding of an implied warranty had the requisite equitable principles been present.

Joe T. Dehmer, Jr.

TORTS—LIABILITIY OF TAVERN OWNER TO MINOR

The defendant tavern owner delivered an order of intoxicating beverages to the car of the plaintiff's sixteen-year-old son. A Florida statute prohibits the sale of intoxicating beverages to minors,[1] but the defendant did not inquire about the age of the plaintiff's son. The boy became intoxicated, lost control of the automobile he was driving and sustained injuries that were fatal. The lower court dismissed the plaintiff's complaint against the tavern owner. HELD: Reversed. The sale of intoxicating beverages to a minor in violation of a state statute is negligence per se. *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963).

At common law it was not an actionable wrong either to sell or to give intoxicating liquor to an able-bodied man,[2] and there could be no cause of action, in the absence of statute,[3] against a vendor for injuries

[20] *Id.* at 583, 28 So. 2d at 223.

[21] *E.g.*, Coca-Cola Bottling Co. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956).

[22] Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923).

[23] Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[24] Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939).

[1] FLA. STAT. ANN. § 562.11 (1962).

[2] *E.g.*, Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

[3] *E.g.*, Beck v. Groe, 245 Minn. 506, 70 N.W.2d 886 (1955).

sustained as a result of the intoxication of his vendee.[4] This common law rule applied to an injury sustained by the vendee[5] or by a third party injured by an intoxicated vendee.[6] The principal reason for not allowing a cause of action was that the consumption of the intoxicating beverage by the vendee, and not the sale of the beverage by the vendor, was said to be the proximate cause of the injury or damage.[7] Other courts have denied liability by holding that an injured vendee was contributorily negligent,[8] or that the vendor could not have reasonably foreseen the injury to a vendee or a third person.[9] There were exceptions to the common law rule, but they were not always consistent. For example, although courts have denied liability where the vendor illegally sold liquor to a minor[10] or an intoxicated person,[11] thereby rejecting the theory of negligence *per se*,[12] they have nevertheless allowed recovery by a third party from a vendor who served a vendee who was addicted to alcohol and had lost his volition,[13] or a vendee who was intoxicated to the point of helplessness and was the subject of wanton disregard for his welfare.[14] In a situation where a vendee was addicted to alcohol,[15] the court drew an analogy from a wrongful sale of habit-forming drugs to an addict,[16] and allowed the spouse of the addict to recover for loss of consortium. The court reasoned that since the addicted vendee had lost his volition and could not consent to the sale, the sale merged with the consumption as the proximate cause of the injury, and the common law grounds for denying a recovery was avoided.[17] Other theories of recovery have been based on an assault and battery by the vendor who served a person who had lost his volition,[18] and the duty of a restaurant operator to protect a guest from injury by another guest who had been intoxicated on liquor sold to him at the restaurant.[19]

Two significant dissents expressed dissatisfaction with the common law rule and reasoned that a vendor of intoxicating liquors should be able to foresee the danger to others when a sale is made in violation of a statute to an intoxicated vendee or a minor.[20] In *Waynick v. Chicago's Last Dept. Store*,[21] the court held that an intoxicated man was neither

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[4]*E.g.*, Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).

[5]See, *e.g.*, King v. Henkie, 80 Ala. 505 (1876).

[6]See, *e.g.*, Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1936).

[7]*E.g.*, Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

[8]*E.g.*, King v. Henkie, 80 Ala. 505 (1876).

[9]See, *e.g.*, Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942).

[10]*E.g.*, Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

[11]*E.g.*, Cole v. Rush, 45 Cal. App. 2d 345, 289 P.2d 450 (1945).

[12]See Prosser, Law of Torts 161 (2d ed. 1955).

[13]*E.g.*, Pratt v. Daley, 55 Ariz. 535, 104 P.2d 147 (1940).

[14]*E.g.*, McCue v. Klein, 60 Tex. 168 (1883).

[15]Pratt v. Daley, 55 Ariz. 535, 104 P.2d 147 (1940).

[16]*E.g.*, Hoard v. Peck, 56 Barb. 202 (N.Y. Sup. Ct. 1867).

[17]Pratt v. Daley, 55 Ariz. 535, 104 P.2d 147, 151 (1940).

[18]*E.g.*, McCue v. Klein, 60 Tex. 168 (1883).

[19]*E.g.*, Peck v. Gerber, 154 Ore. 126, 59 P.2d 675 (1936).

[20]Cole v. Rush, 45 Cal. App. 2d 345, 289 P.2d 450, 457 (1955) (dissenting opinion); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530, 534 (1949) (dissenting opinion).

[21]269 F.2d 322 (7th Cir. 1959).

"able bodied" nor "ordinary," and that the violation of a statute prohibiting the sale of intoxicating beverages to him was negligence because it violated a standard of conduct required for the protection of the public and of the vendee. The case of *Rappaport v. Nichols*[22] involved the sale of liquor to an intoxicated minor. The court reasoned that a tavern keeper who sells liquor to one whom he knows or should know to be intoxicated or to a minor ought to foresee the unreasonable risk of harm to others through the probable acts of the vendee. The court supported the *Waynick* case by stating that the violation of a criminal statute prohibiting the sale of liquor to minors and intoxicated persons was a breach of the standard of care required for the protection of the general public, and constituted negligence. Although the court in the *Waynick* and *Rappaport* cases discussed statutory negligence, the decisions seem to have been based upon the theory of foreseeability.

The court in the instant case reasoned that the statute prohibiting the sale of alcoholic beverages to minors was intended to prevent injury to immature persons not of legal age, and its violation was negligence *per se*.[23] The court pointed out that when the sale occurred the defendant did not try to ascertain the age of the minor and saw that he was in a car—a dangerous instrumentality. Although the court reached the same result as in the earlier decisions establishing liability against a vendor of intoxicating beverages, it did not cite those decisions. The court cited a Florida decision holding that to sell a firearm to a minor in violation of a statute was negligence *per se*.[24] Even though the court engaged in a rather brief and confusing discussion of the foreseeability test, it is apparent that it based its decision on the theory of negligence *per se*. The result of this decision is acceptable because, when liability is based upon negligence *per se*, contributory fault is no defense where the defendant's negligence consists of violating a statute enacted for the protection of a class of persons who are unable to exercise self-protective care.

Henry S. Davis, Jr.

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[22]31 N.J. 188, 156 A.2d 1 (1959).

[23]Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963).

[24]Tamiami Gun Shop v. Klein, 109 So. 2d 189 (Fla. Dist. Ct. App. 1959).

RECENT BOOKS

Encyclopedia of Tax Shelter Practices

By the Prentice-Hall Editorial Staff, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1963. Pp. 1026. $29.95.

Every attorney should be keenly aware of the need for effective tax planning in order that he may competently and effectively represent his clients. The drafting of the majority of legal instruments which are prepared in law offices today involves questions of immediate or long-range tax problems; it is the degree of knowledge and skill which the lawyer should provide in the consideration of the content of these instruments which in the long run will permit the client to reduce his tax liability.

Federal taxation is ubiquitous, and while an attorney may feel that he has suggested a solution for a "legal" problem and prepared an instrument which, in the considered judgment of the lawyer, is sound, well drafted and carries out the desires of his client, if the attorney does not have a keen awareness for the present and future tax consequences of the instrument he has failed to provide his client with complete and competent counsel. The impact of federal taxation on practically all business, accounting, legal and financial activities cannot be regarded lightly or overlooked by the attorney in the important role he plays today. Clients demand and expect competent legal advice in the area of taxation; they expect their attorneys to provide it. The fine art of taxmanship demanding the services of competent tax counsel is not what is suggested here but a knowledge of some of the fundamental, elemental, if you will, tax consequences which will ensue from the preparation of the great majority of legal instruments drafted in the lawyer's office. To fail to be knowledgeable in the vast sea of the Internal Revenue Code is to abdicate the responsibility of the attorney, and to furnish the client something less than complete legal advice. To prepare an instrument without considering its tax consequences and to advise the client with respect thereto is to give him less than he is entitled to and to ignore a most pressing and practical field of law. In short, it is less than a complete discharge of the attorney's professional responsibility to his client. The importance of the task is apparent when one reflects on the contracts, deeds, wills, corporate problems, securities transactions, management problems, divorce problems, condemnation proceedings, partnership agreements, oil, gas and other mineral problems, powers of appointments, joint ventures, and damages, to mention but a few.

The art of taxmanship is indeed a fine one in many respects, and the rightness and wrongness of the legitimate avoidance of taxation

has been the frequent subject of philosophical comment. While the courts themselves have commented on the morality of conduct in the area of lawful tax avoidance the opinion of one of the great jurists of our times, Learned Hand, leaves no doubt as to its legality:

> [I]f I understand the Commissioner, he wishes us to consider that these deeds may have been a preliminary step in a reprehensible scheme to lessen the wife's income taxes. There is not the faintest ground for imputing any such purpose to the parties at bar; and, if there were, it ought not to count. Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.[1]

Analysis reveals that there occur few transactions which cannot be planned to suit the tax convenience of the client, and the editors of this volume have compiled an omnibus of current tax shelter practices and techniques designed to offer the attorney a carefully treated and detailed analysis of suggested alternatives which will assist him in implementing the plans of his clients in reducing their tax bill. The common denominator of tax savings devices appears to be the alternative courses of action which are available to the taxpayer. The practitioner must suggest to the client the appropriate choice at the proper time. Significantly, then, in order to make a choice the tax adviser must know that he has a choice. Alternative courses of action in differing situations are available under the Internal Revenue Code, regulations issued to implement the code, and by cases and rulings which interpret the code.

The code itself offers the taxpayer a number of elections in varying situations. Husbands and wives may elect to file joint or separate returns, partners may elect to be treated as corporations, and stockholders in certain corporations which have ten or less stockholders may elect to be taxed as partners. The individual taxpayer has the election to itemize deductions or to take the standard deduction, and different methods of depreciation are available to the taxpayer. The foregoing represent just a sample of the elections available under the code suggested by the editors. Additionally, the code, by its composition, creates implied options of which the taxpayer may avail himself. Under certain conditions, assets may be exchanged without incurring any gain. A taxpayer is not under obligation to sell an asset or to exchange it. He may do either, and if aware of the alternative will probably elect the method which will yield the greatest tax-saving. The code provides that taxpayers may take a deduction for medical expenses paid during the

[1]Commissioner v. Newman, 159 F.2d 848 (3d Cir. 1947).

year in excess of three per cent of their adjusted gross income; here again the taxpayer may save money by choosing the year in which he pays the bill where the medical expenses come near the end of the year. Contracts of sale frequently do not set forth any special assignment of values for the property sold, but the assignment of such values may have important tax results. Should one assign a separate value for an unsevered mineral estate and a separate value for the surface estate at the time the deed is drawn? The option appears to be one the parties may make.

Frequently, the application of strict rules of law militate against the taxpayer and may produce disastrous results. A taxpayer may enter into an arms length and bona fide sale to his brother or son, but any loss incurred on such a transaction will not be deductible. A taxpayer who repurchases stock sold at a loss less than thirty days previously may not deduct that loss irrespective of his intentions. A corporation that declares an ordinary dividend just before liquidation will cause the entire amount received by the stockholders to be taxable to them, even though the final liquidation results in a loss.

The editors have set forth a guide to tax savings and indicate the main areas which should serve to point the direction tax savings effort should take. They are as follows: Keep your income stable to avoid top rate brackets; speed up or defer income and expenses to take advantage of anticipated higher or lower tax rates; spread income among several taxpayers (dividing income with close relatives or setting up multiple corporations are examples); spread income over several years to keep out of higher tax brackets and postpone tax; transform ordinary income into long-term capital gain; take full advantage of all exemptions and deductions; take advantage of elections, such as the election as to depreciation method or accounting elections; use tax-free money to expand your business operations (for example, deducting promotion, research and development expenses, taking the investment credit, or using accelerated depreciation methods to write off plant and equipment which will yield additional working capital for expansion); select the best form for your business operations (for example you may want to use a partnership or proprietorship in the early years so that any losses can be used to offset personal income taxed at higher rates). Once the business is on a paying basis, you may consider the corporate form to take advantage of the flat corporate rate instead of the graduated personal rates. Later the corporation can be liquidated or the corporate stock sold to convert ordinary income into long-term capital gain), and to set up business transactions in the direction which makes overall use of tax rates, earning potential, and losses and assets that can be depreciated (sale-leaseback deals and mergers are examples).

After the taxpayer has determined in which direction he desires

to proceed but the road ahead is still uncertain the editors suggest he may take the calculated risk approach to achieve the tax savings he seeks by offering him a methodology to assist him in the decision, that is the taxpayer should consider his after-tax position if the plan works, if the plan fails and if he does nothing. Thus if the taxpayer stands to lose more than he can gain or, on the other hand, if the overall gain will be slight, the taxpayer may want to forget the plan. If, however, taxpayer has a substantial gain in mind and any potential loss is small he may well want to go ahead with it, even though he may not be on strong ground from a technical standpoint.

Where the attorney is confronted with the tax treatment of items involving conflicting or questionable rulings or decisions how can he avoid excessive tax liability when the question in dispute will not be settled until a later date? The editors indicate he has two courses of action open to him in filing a return that involves an uncertain or disputed tax matter. The taxpayer can omit the questionable item from gross income or claim the questionable deduction and rely on the possibility that there will be a favorable decision before the return is audited and a deficiency assessed. If the item is omitted from gross income, the facts should be reported and explained with the return. On the other hand, the taxpayer can report the questionable item in gross income, or omit the questionable deduction and rely on the right to refund in the event of a favorable decision later.

This work represents the first all-inclusive omnibus of tax shelter methods and techniques contained in one volume. Eight books are combined in the one encyclopedia and it provides many profitable tax havens for the taxpayer; the book covers the entire area of Federal Income and Estate and Gift Taxation from the standpoint of tax planning. It contains valuable information for all including the business man, the executive, the investor, the real estate operator, the individual and the family. The chapter providing a guide to tax shelter practices points the way for the attorney. Each point discussed contains basic statements, observations, illustrations, warnings and suggestions on how to do it.

This well-indexed, comprehensive volume represents a major contribution by the Editors of Prentice-Hall to the field of taxation. The volume is one worthy of a place in the library of every law office. It is well-written in the style of Prentice-Hall and, in my opinion, an excellent text for the busy lawyer.

Arthur B. Custy
Professor of Law
University of Mississippi

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